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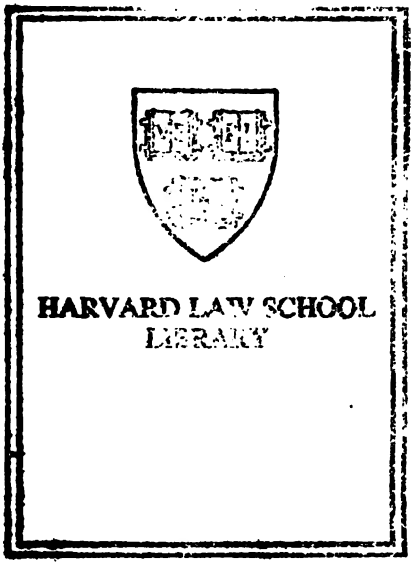
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ANNUAL REPORTS.

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REPORTS

OF

CASES ARGUED AND DETERMINED

IN THE

SUPREME COURT OF LOUISIANA.

VOL. 45—FOR THE YEAR 1893.

PART II.

HENRY DENIS, REPORTER.

NEW ORLEANS:
F. F. HANSELL & BRO., PUBLISHERS.
1894.

Rec.—Apr. 8, 1895.

He avers that J. N. Baham has possession of the same without right, shadow or color of title, and has been occupying the same since June 19, 1883. He asks for judgment recovering the land and condemning defendant to remove therefrom and to pay revenues at the rate of $150 per annum from judicial demand.

J. N. Baham disclaimed title and averred that he held possession for his mother, Marcelite Baham, widow of Honore Baham, with the exception of 100 acres, which he says she had previously donated to George Baham, who sold the same to Anatole O. Leaumont.

Plaintiff, by supplemental petition, made Mrs. Marcelite Baham and Anatole O. Leaumont parties defendants, reiterating his allegations and directing his demand and prayer against them.

They filed separate answers, presenting defences substantially identical.

Mrs. Baham answered that she owned the land, less 100 acres donated by her to George Baham and by him sold to A. O. Leaumont. Her claim of title, as alleged, is, that her husband acquired said land in 1848; that he went into possession at that time and so held until his death; that on the settlement of his estate she became the owner of said land at the partition thereof; that the act was duly recorded, and that in good faith as owner she has since held undisturbed possession.

Leaumont, in his answer, sets up the donation from Mrs. Baham to George Baham and the act of sale from the latter to him. The defendants pleaded the prescription of one, three, five, ten, and thirty years. The judgment of the lower court was in favor of the defendant, and the plaintiff has appealed.

Plaintiff claims to have acquired the land from the liquidation of the Clinton & Port Hudson Railroad Co. at a sale made on the 19th day of June, 1883, by the sheriff of Tangipahoa, under an order of sale procured by the liquidator from the Sixteenth District Court. He avers that the railroad company acquired the same at a sale made by the sheriff of St. Tammany, *January 7, 1860*, under proceedings *via executiva* taken by the liquidator in the Eighth Judicial District Court for the parish of St. Tammany against William Marbury and his heirs upon a stock mortgage given by said Marbury in favor of the railroad company to secure the payment of eighty shares of stock, which mortgage bore upon the property in controversy.

That Marbury acquired the property by survey and location from the United States Government, he having located a settlement certificate, of which he was the purchaser, which had been issued to John Morgan in 1824, Morgan having settled on the land in 1812.

That under this location and certificate a patent issued from the United States on the 18th day of April, 1871, to John Morgan or his legal representatives, and to his or their heirs, and that said patent inures to his benefit.

Defendants contest plaintiff's pretensions very vigorously. They declare that he has by his own evidence shown the original title to have been in John Morgan, and that he has failed to show that Marbury, under whom he claims, ever acquired that title, but assuming that he had, the description of the property mortgaged by Marbury to the railroad company was entirely different from that of the tract in litigation; that in the proceedings *via executiva* and in the deed of sale thereunder the *mortgage* description was followed, and the adjudicatee took under that description and acquired nothing other than what was covered by it.

This contention requires a statement of the facts connected with this title.

In the record is a certified copy and an affidavit of Willliam Marbury, in which he declares that Sachy and Hanchey obtained a certificate for 640 acres of land in the parish of St. Tammany, by virtue of purchase from John Morgan, and that he, Marbury, became the purchaser of said land at sheriff's sale, and he can not get possession of said certificate. The affidavit bears date *September 6, 1824.*

On the same day Samuel T. Rennels, register, and Will. Kinchen, receiver of the United States, issued from the land office of St. Helena their certificate, *No. 213*, New Series, in which they declared "that the Claim No. in the report of the commissioners, marked C, claimed by John Morgan, original claimant John Morgan is confirmed as a donation claim, and entitled to a patent for 650 acres, situated in the parish of St. Tammany, and claimed under habitation and cultivation since 1812."

On the 20th September, 1825, the following order of survey was issued:

" ST. TAMMANY, September 25, 1825.

"JOHN MORGAN.

"CERTIFICATE No. 213.

"*Dated 6th September, 1824.*

" William Marbury claims a section of land situate in the parish of St. Tammany by virtue of a duplicate certificate granted to John Morgan, No. 213, dated September 6, 1824, and signed Samuel T. Rennels, register.

" It is ordered that the claim of the land be located as follows: To begin at *White Bluff on the Tangipahoa river*, and from thence to the line of William Hardens, thence to the improvement in an easterly direction southwardly across the Sweet Water, thence down said stream and to the beginning so as to include *6150 acres.*

" Given under our hands this 20th September, 1825.

(Signed) " SAMUEL T. RENNELS, *Register.*

" WILL. KINCHEN, *Receiver.*"

In *1827* this claim was located by *A. T. Womack*, deputy surveyor, and figures *on the map of 1828* in the name of *William Marbury*, as *section* 39, *township* 5 *south*, *range* 8 *east*, containing 550 acres, and as *section 41*, *T. 5 S.*, *R.* 7 *east*, containing *ninety acres.*

The land appears on that map as a rectangle, AND NOT ONLY *does not touch the Tangipahoa river at any point, but is at a very considerable distance from it.*

On the 29th October, 1832, the United States Surveyor General for Louisiana wrote as follows to Marbury:

"SURVEYOR GENERAL'S OFFICE,
" DONALDSONVILLE, October 29, 1832.

" *William Marbury, Esq.:* SIR—I send you herewith enclosed an order of the survey of your claim on the Tangipahoa, which, on inspection of the township plat, I see was improperly located. The order of survey given by Rennels and Kinchen being on file in the office, I have thought proper to have the survey made in accordance with it. I can find neither certificate nor order of survey of your unsurveyed tract. You can apply for them at St. Helena and forward them to me. * * * A copy of the order of survey by Rennels and Kinchen is forwarded.

" I am, etc.,

(Signed) " H. B. T."

On the *26th October, 1832*, the following order of survey was issued from the Surveyor General's office:

"SURVEYOR GENERAL'S OFFICE, Oct. 26, 1832.

"*To any Deputy Surveyor of Public Lands for the State of Louisiana:* You are hereby authorized and required to survey, measure and mark *for William Marbury* a tract of land granted *to John Morgan by certificate No. 213*, to contain 640 acres, situated in the parish of St. Tammany, in the district east of the Island of New Orleans and west of the Pearl river, in conformity to an order of survey from the Register and Receiver of the Land Office at St. Helena, dated September 20, 1825.

"You will be careful to make and note all the necessary connections with the intersecting and adjoining lines of surveys, whether public lands or of private claims, and you are not to interfere with any established lines. You will return the field notes and plat of the work, when completed, to this office.

(Signed) "H. B. T., *Sur. Gen.*"

On the 16th of September, 1838, Marbury executed in favor of the Clinton & Port Hudson Railroad Company the mortgage which has been referred to, covering, among other properties, the following: "One other tract in section ——, containing by survey six hundred and fifty acres, and situated *on the waters of the Tangipahoa river*, identified by a plat bearing on its face the name of William Marbury, in two places, and as having five hundred and fifty acres in *section* 39, of *township* 5 south, *range* No. 8 east, and ninety acres in *section* No. 41, *township* 5 south of *range* No. 7 *east.*"

There are several noticeable features in this description—the first is the call for the land as *being situated on the waters of the Tangipahoa river;* the second, the quantity of land; the third, the description by numbers of township and ranges. A comparison of the map with the description thus given will show at once that the land *intended to be mortgaged was the land covered by certificate 213, issued in the name of John Morgan*, but referred to by the numbers of township and range *as located by the survey of 1827.*

The Congress of the United States, by act passed 29th August, 1842, declared all the entries of lands made in the Greensburg District to be null on account of the errors and imperfections of the public surveys, or to conflicting claims, and authorized the return of the pur-

chase money on returning the certificates and ordered a resurvey of the district, and that when the resurvey should be confirmed the public lands (unreserved) therein specified shall be subject to the laws for the disposal of the public lands, with the proviso—"Provided, that purchasers aforesaid may retain their certificates of purchase, and the surveys of said tracts shall be corrected, and when said surveys are corrected may receive their patents from the United States for the lands so purchased by them."

The resurvey contemplated by this law was made and duly approved on the 15th August, 1845. Watterson vs. Bennett, 18 An. 253.

We find in the record a copy of the field notes of R. C. Brent, Deputy United States Surveyor, of a survey made by him in 1845, the heading of which is as follows:

"*T. 5 S.* Rs. 7 and 8 E.

"GREENSBURG DISTRICT, LA.

"John Morgan (confirmed).

"WILLIAM MARBURY,

"C. and O. No. 213.

"Section *41*, T. 5 S., R. 7 East.

"Section 39, T. 5 S., R. 8 East."

These field notes show that the survey commenced at *White Bluff, on east and left bank of Tangipahoa river*, and after running eastwardly, northernly, eastwardly, southwardly and westwardly, struck *a second time the Tangipahoa*, locating the John Morgan tract with *the Tangipahoa river* as its *western boundary* and giving 638 77-100 as the area of the land.

The land as located by this survey figures on the approved township maps as *Section 41. T.* 5, R. 7 East, containing five hundred and thirty 45-100 acres, and *Section 39, T. 5 S.*, R. 8 East, as containing one hundred and eight 32-100 acres *and not as originally located* as *Section 41, T. 5 S., R. 7 E.*, with ninety (90) acres, and as *Section 39*, T. 5 S., R. 8 E., with five hundred and fifty acres.

It appears beyond the possibility of a doubt that the *certificate No. 213, in favor of John Morgan*, was *finally located on the Tangipahoa river* under the Brent survey, thus showing the original survey to have been erroneous and the description of location by numbers of sections and ranges to have been incorrect.

The evidence in the case places beyond controversy the identity of the land claimed by the plaintiff with that claimed by the defend-

ant. Defendant, independently of any question of her *own title*, contests that of plaintiff, as we have seen, (1) because Marbury is not shown to have acquired the rights of Morgan, and (2) because if Marbury did acquire them he did not mortgage the particular property now in litigation to the Clinton & Port Hudson Railroad Company, but some other property, and therefore *Marbury's title* is still outstanding.

In Marbury's mortgage to the railroad company the land is described as *situated on the Tangipahoa river*, as containig 640 acres, and as being *Section No.* 41, *T.* 5 *S.*, *R.* 7 East, and *Section* No. 39, *T.* 5 *S.*, *Range 8 East.*

A reference to the maps will show that *the calls* for this land so located *are irreconcilable.* If the *land lies on the Tangipahoa river*, as the mortgage declares, it certainly can not be the sections of the township and ranges mentioned—one or the other of the calls *is forced to yield.*

Under the exceptional facts, indubitably shown by the evidence, we think *the call for the river* must prevail over the mere statement by number of township and range. Marbury clearly intended to mortgage some property belonging to him. He was at the time of the mortgage recognized by the officers of the government to be the owner of the Morgan certificate and Morgan's rights under it, but which, while calling for a tract on the *Tangipahoa river*, had been *located improperly* and erroneously, and *under wrong numbers.* When Marbury, describing the land which he mortgaged as situate *on the Tangipahoa river*, and as containing 640 acres (both of *which were correct calls for the Morgan tract*), added to the description by giving number of sections, township and ranges, to which his only claim of ownership rested upon a location of the Morgan certificate, his intention *to mortgage* the land *which he held under the Morgan title was very manifest*, and as between himself and the Clinton & Port Hudson Railroad Company he was committed to the description of the land *as being on the river Tangipahoa* (which was the correct call) as the *controlling call* of the thing mortgaged by him. When by subsequent resurvey of the Morgan location the error in the original location was established, and any and all claims of Marbury to the particular sections, as shown by the original survey, were annihilated and his rights were fixed to correspond *with the two correct calls* of the *Morgan certificate* and Marbury's mortgage, showing a tract

fronting on the Tangipahoa river, containing six hundred and thirty-eight acres and seventy-seven hundredths of an acre, and placing the land as it should have been originally placed in other sections, township and ranges; the correction and new location, whilst it bound Marbury, inured to the benefit of his mortgage creditor. There was in this *no change in the thing mortgaged, no substitution of one tract for another*, but a mere yielding of incorrect and improper calls and a replacing of them by others to bring them to conform to other calls, which being correct all the time were not altered, but adhered to by the government.

Neither in law nor equity could Marbury claim to have become the owner as under a new location of a new tract, and by so doing force his creditor to look to the enforcement of his mortgage upon lands which, as matters developed, *were shown not to have belonged to the debtor*.

The only error in the mortgage was a *partial* error *in description* merely; that error was corrected, and, as matters took shape, the identity of the land became absolutely certain, and the maxim "*Falsa demonstratis non nocet*" applied with full force to the original description.

Thus holding, it follows that we recognize Marbury's mortgage act, as between him and the company (though imperfect in its description), to have been none the less a valid legal mortgage covering the Morgan tract as finally located. To hold otherwise would be to destroy the act, which we should not do, *magis valeat quam pereat*.

The foreclosure of the mortgage and the purchase made by it under the foreclosure conveyed the property to the Clinton & Port Hudson Railroad Co., as between the parties.

The subsequent sale of the tract in the matter of the liquidation of the Clinton & Port Hudson Railroad vested in the same manner the land under Marbury's title to the plaintiff.

The fact that in *this sale* an exact and perfect description of the land was made is of importance as giving certainty in future contracts, in respect to it, but ownership would have passed between the parties to plaintiff, even under the original partially incorrect description.

But the defendants say, however, this may be true of Marbury and his heirs; there is nothing to show that *Marbury* had any title; his claims rest entirely upon an *ex parte* affidavit which gives no number

of the certificate, no description of the land, and which states neither *res pretium* nor *consensus*.

Whether the government in dealing with the Morgan certificate, and Marbury in connection with it, acted exclusively upon the affidavit or not we do not know. We understand Morgan not to have claimed under any Spanish or other perfect grant, but only under a settlement or cultivation right, and the action of the government relatively to that claim was in respect to land which at the time of its action *belonged to itself absolutely*. Whether or not the government officers were justified by the sufficiency of the evidence before it in treating with Marbury as the assignee or holder of the Morgan claim, we can not say—we only know as a fact that *they did so act* upon a matter which no one but Morgan had a right to question. Their conclusions are not open to collateral attack. Everything goes to show that the government—the holder of the fee, was willing to consider and did consider Marbury as entitled to Morgan's rights, and he or any one under him is entitled *prima facie* to hold that position and all the rights flowing from the same, subject of course to any direct attack by persons holding title under Morgan.

As between Marbury and his heirs we hold plaintiff's title good—as between plaintiff and any one not holding under Morgan but merely attacking collaterally plaintiff's title on the ground of a possible outstanding title in Morgan, we hold plaintiff's title good.

We understand the rule to be that although the United States government always issues its patent, as was done in this case, in the name of the original claimant, his legal representatives and his or their heirs, as the case may be, the patent inures to the benefit of those with whom the commissioners have dealt as holders under derivative titles, and claims advanced by the latter, though not binding on the original grantee or those claiming under him, are *prima facie* good against the rest of the world (Hennen's Digest, p. 1264, Nos. 9, 11, 12).

This last statement may be too broadly made, but not too broadly for the purposes of this case.

We now turn to the consideration of the claims advanced by defendant, and first to the title declared to have been in Honore Baham.

Although the defendant alleged her husband had acquired the land about March, 1848, for a valuable consideration, and held and pos-

sessed the same as owner in good faith, publicly, continuously and peaceably from that time until his death, early in 1859, it will be noticed that she nowhere states from whom, in what manner, and under what circumstances he did so, nor does she aver that the person under whom he may have held had himself title to the property.

Defendant, however, was permitted to introduce evidence on the subject, which consists first of a promissory note to the following effect:

"$180. NEW ORLEANS, March 20, 1848.

"Three months after date I promise to pay to the Union Bank of Louisiana, at its office, one hundred and eighty dollars, for value received.

(Signed) his "HONORE X BAHAM. mark.

"Attest: T. S. HALEY."

And an "*Admission*" found in the record as follows:

"18th Judicial District Court, Tangipahoa Parish.

W. F. KERNAN *vs.* J. NORAH BAHAM. } No. 702.

"It is admitted that defendant produced and filed the receipt marked *U. B. No. 1*, and that it has been lost or mislaid. As it can not be found, the parties make this admission and agreement to supply its place and to complete the record, to-wit: The said receipt bore date March 20, 1848, at New Orleans. It was in favor of Norah (or Honore) Baham, and was signed by the Union Bank of Louisiana. It stated the payment in cash of a sum of money not definitely remembered, as the cash payment for certain lands in St. Tammany parish sold that day by the bank to said Baham, and also stated the execution of the note for $180, of same date in the record, and marked 'U. B. No. 2,' as the balance of the price to be paid. This admission as to the contents of said receipt marked '*U. B. No. 1*' is to be copied in the transcript of appeal. The record in this respect is to be held as complete, this admission supplying the lost receipt.

* * * * * * * *

(Signed) "W. B. KEMP, *Atty. for Plff.*

"S. D. ELLIS, *Atty for Defts.*"

The writings which defendants present as establishing their title are not only insufficient *per se* for that purpose, but they are so defective as not to serve as a basis upon which a title could be built up or eked out by parol. The declaration that the promissory note was given as "the price of certain lands in the parish of St. Tammany" is entirely too general to justify the admission of parol evidence to establish *possession* of particular property by the party named in the instrument as the vendee, and *from such possession to assume or infer it to be that referred to in the writing.* Parol evidence to establish identity is allowable, as is likewise parol evidence of possession in aid of a defective or ambiguous description, but this is only in cases where there is a sufficient body in the description to leave the title substantially resting on writing, and not essentially on parol, as it would have to rest, if at all, in the case at bar.

When a person has title and possession conformable to it he is presumed to possess according to the title and to the full extent of its limits, but no such presumptions run merely from possession back to conformity with a supposed written title. A title with a reasonable degree of certainty of description would have to be produced. Green vs. Witherspoon, 37 An. 751.

Holding as we do that Honore Baham has not been shown to have had a title to the land in litigation, he must be considered for the purposes of this suit as a trespasser, and the plaintiff is not held to establish as against him a title perfect in every respect.

I.

We have now to inquire whether the rights of parties were affected and if so to what extent by the death of Honore Baham.

In dealing with that question it must be borne in mind that the thirty years' prescription is pleaded under Honore Baham's possession joined to the possession of his widow and heirs as continuing *as his successors*, and that the ten years' prescription is pleaded under the title alleged to have been in Baham, and under the *act of partition, which was itself expressly based upon that title*, and also that the widow is claiming exclusively under community rights, and as so claiming does not stand as a stranger or a third person *quoad* that community (Hennen vs. Hennen, 5 Rob. 25.)

Such title and possession as Honore Baham had was acquired during his marriage, whilst he was head and master of the community.

When he died his succession was at once opened and his title and possession continued and passed unchanged, unbroken, and without interval to his heirs and to his widow in community (C. C. 934, 940, 941, 942, 2405, 2406, 3496.)

The extent of the rights of the deceased and of the community regulates those of the heirs and of the widow in community, who succeed to all his rights and those of the community, but they are transmitted with all their defects as well as all their advantages, the change in the proprietor producing no alteration in the nature of the title or possession.

When the widow and children of Baham partitioned among themselves the property left by him they had no other rights either by way of title or possession therein than he had, and when that partition was effected in kind, neither the children who took the slaves nor the widow who took the land acquired thereby any new title or possession. In view of the necessity in the matter of the prescription of ten years of the party pleading the same, presenting himself as having possessed the property claimed as owner under a title translative of property in good faith during the period required by law, and in view of the necessity of the title so presented being valid in point of form—being certain and being proved, defendants, apprehensive that they could not rely upon the title of the *father himself*, have declared *upon the partition proceeding* as creating *a new title* and giving a *new possession*, and the notarial act of partition as evidencing *an act translative of property*.

In this defendants are mistaken. An act of partition is not "*translative*" of but merely "declaratory" of property—each party giving up his existing rights in the particular thing which he *abandons* for the existing rights of the others in the thing which he takes (C. C. 1382.) It is nothing more than a regulation *inter se* as to the property, in no wise changing the title or possession.

We find in Dalloz' Dictionnaire de Jurisprudence as bearing upon this subject the following:

"Le partage est *déclaratif* et *non transmittatif* de propriété. En d'autres termes, chacun est censé avoir succédé seul et immédiatement à tous les effets compris dans son lot ou à lui échu sur licitation et n'avoir jamais eu la propriété des autres objets de la succession." (Cod. Civ. 883.)

" En vertu de la maxime " le mort saisit le vif " on répute l'héritier propriétaire de son lot depuis le moment de l'ouverture de la succession et le partage ne sert qu'à *déclarer* quel est le lot. Le système admis par le droit Romain qui regardait le partage comme une *acquisition* faite par chaque héritier des parts indivises de ses cohéritiers dans les objects dépendants de son lot ne l'était pas dans notre ancienne jurisprudence.

" Le principe de l'Art. 888 n'est pas restraint aux partages ou licitations entre co-héritiers, il s'applique à toute propriété indivise quelque soit le titre de la possession commune—à la communauté—à la société." See the author cited, *verbo* " Partage," Art. 7, Nos. 271, 272 and 808.

And still further under the heading " Prescription," No. 752:

" Le partage n'est dans notre droit que *déclaratif*, et par suite *il ne peut servir de base à la prescription décénale.*"

There may be *divergent rights* as between the widow and the heirs themselves as resulting from a partition, but the title, possession and prescription of the thing with respect to which they are acting remain unchanged, and go back to its origin as a unit. For an application in a different form of the same principle see 5 Martin 485, *Quum ex una stirpe, unoque fonte*," etc.

But aside from the character of an act of partition as being "translative of or merely declaratory" of property, an obstacle standing in the way of an acquisition of the property by the widow and heirs springs from the nature of the possession required of a person setting up such a claim viewed from the standpoint of its legal good or legal bad faith.

The law requires as a basis for the ten years' prescription, possession in good faith, and that the widow and heirs of Baham have not, from a legal standpoint, shown.

As *to the heirs*, we refer to Dalloz, under the heading of Prescription, No. 813, where it is said:

"Le propriétaire établit suffisamement la mauvaise foi du possesseur en prouvant que celui tient la chose comme héritier (fut-ce même comme héritier bénéficiaire), d'un possesseur de mauvaise foi." And as to the widow, we refer to the decision of this court in Hennen vs. Hennen, 5 Rob. 25, already cited.

Were Honore Baham alive, setting up in this action the prescription of ten years, he would fail to do so successfully, and his widow and heirs occupy no stronger legal position than he would.

We next come to the prescription of thirty years:

There is evidence showing that Honore Baham, about the year 1848, occupied a portion of this land, but precisely how much he actually took possession of originally is not shown. He seems at one time (not precisely fixed) to have fenced in a very considerable portion of the tract and to have had a field in cultivation. There is nothing in the record by which the court could LOCATE these portions, even were we to hold that prescription would cover them, but we have, aside from this, reached the conclusion that the plea of prescription filed is not tenable. This property was, as we have seen, mortgaged by Marbury to the Clinton & Port Hudson Railroad Company. The mortgage was foreclosed and the land sold on the 7th day of January, 1860. Between this last date and the date of the filing of the present suit thirty years did not elapse. We concur in the opinion of the district judge that, under its exceptional legislation relatively to property bank mortgages, the Legislature intended to protect those mortgages against any adverse rights, either of ownership or possession, subsequent to their date and up to their enforcement or maturity. Adverse possession, therefore, did not commence in this case until after the 7th day of January, 1860.

We are of the opinion that the plaintiff is entitled to a judgment and decree recognizing him as the owner and entitled to the possession of the property described in his petition; and that the judgment of the district judge rejecting his demand should be annulled, avoided and reversed.

For the reasons herein assigned it is hereby ordered, adjudged and decreed that the judgment of the District Court be and the same is hereby annulled, avoided and reversed, and it is now hereby ordered, adjudged and decreed that the plaintiff, William F. Kernan, do have judgment in his favor and against the defendants, Mrs. Marcelite Baham, widow of Honore or "Norah" Baham, and Anatole O. Leaumont, recognizing and decreeing the plaintiff, William F. Kernan, to be the owner of and entitled to the possession of the property described in his petitions herein—a certain tract or parcel of land lying and situate in the parish of Tangipahoa, containing six hundred and thirty-eight acres and seventy-seven hundredths of an acre, and more fully described as follows: Section forty-one (41), township five (5) south, range seven (7) east, and section *thirty-nine* (89), township five (5) south, range eight (8) east, and ordering the

said defendants, Mrs. Marcelite Baham and Anatole O. Leaumont, to deliver possession of the said property to the plaintiff. It is further ordered, adjudged and decreed that this case be remanded to the District Court for the purpose of ascertaining, determining and fixing the rights of the parties relatively to rents and counter claims.

Rehearing refused.

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45 814
118 227

No. 11,223.

V. M. PURDY VS. A. J. FORSTALL ET ALS.

1. A mere declaration by a creditor that he would not execute his judgment until a certain person should return from Europe is not such a granting of time as would release the debtor's surety. Even had the words used been unequivocal, they being expressive of mere intent did not create any obligation nor estop the creditor. C. C. 1814, 1815.
2. Mere forbearance or delay of a creditor in enforcing his rights against the principal does not release the surety, who may, if he chooses, pay the debt, and becoming subrogated to the creditor's rights control the claim to his own satisfaction.
3. A surety upon an unconditional obligation to pay has no right when sued to attempt in that suit, to which the principal debtor is not a party, to adjust collaterally an unliquidated claim for damages for inexecution of a contract between the latter and the creditor, which the principal debtor has not himself claimed or asserted.

APPEAL from the Seventh District Court, Parish of East Carroll. *Montgomery, J.*

Robert Whetstone and *Cunningham & Lyons* for Plaintiff and Appellee.

Omer Villeré for Defendants and Appellants:

1. Forbearance to sue does not release the surety, who might have paid the debt at maturity and enforced the obligation against his principal. 28 An. (N. R.), Case vs. Sarpy; 29 An. 844, Hill & Co. vs. Bourcier et al.
2. Mere inaction on the part of the creditor does not discharge the surety. 32 An. 1280, Pharr vs. McHugh & Vinson.

The opinion of the court was delivered by

NICHOLLS, C. J. The plaintiff alleges that under a writ of *fi. fa.* issued from the District Court for East Carroll parish in suits Nos. 701, 705, 708, 709, 711 and 748 the sheriff of that parish had seized and advertised for sale certain property belonging to him.

That he was informed that said writ was issued at the instance and under the instructions and order of Anatole J. Forstall, upon a certain pretended twelve months' bond for $2400, which he claims to own, given for the sale of a lot of mules and other personal property sold under judgments in the above numbered suits, which said bond was executed on the 5th day of June, 1886, and held by the sheriff or some other person until the 12th day of June, 1889, when it was filed in the District Court for East Carroll in the clerk's office, endorsed in blank by J. C. Bass, sheriff, and the writ of *fi. fa.* was issued upon it, and his property seized.

That said seizure was wrongful, unjust and unwarranted, because it was in violation of an express agreement upon the part of Francis M. Taylor (who acted as the agent of A. J. Forstall) with petitioner, who, petitioner was informed, believed and alleges, acted in the interest and benefit of said Forstall and in the interest and benefit of Mrs. F. M. Taylor, the defendant in the above mentioned suits.

That when the sale was made of said mules, etc., and it became necessary to give said bond, F. M. Taylor, acting as aforesaid, procured and induced the plaintiff, Purdy, to become surety thereon, with the understanding that he would not be held liable on the same if the proceeds should be held by the court to belong to Forstall and Hernandez.

That at that time there was an agreement upon the part of Forstall to sell Mrs. Taylor and Francis M. Taylor the Live Oak plantation, which Forstall had lately purchased under a foreclosure of mortgage, and to which said mules, farming utensils, etc., were attached and belonged, as claimed by Forstall, and said F. M. Taylor purchased the same with the understanding that they would be covered by the purchase price of the sale of the plantation, and plaintiff signed said bond with said Taylor, as he understood, at the request of Forstall, to protect them from passing out of the hands of said Taylor, and taken from the Live Oak plantation; and when he signed said bond as Taylor's security it was his understanding that Forstall and Hernandez would look only to the property, for the purchase of which the bond was given, and not to him.

That after the execution of said bond Forstall and Hernandez were declared by a judgment of the District Court for East Carroll, upon oppositions filed in suits Nos. 701, 705, 707, 708 711 and 748, to be entitled to the proceeds of the sales made under the *fi. fa.* issued

thereon, and for which the bond was given, and in violation of said agreement of his (Forstall's) agent he was seeking to hold him upon the bond.

That said *fi. fa.* was wrongfully issued upon said bond because it was not at the time the same was issued such an instrument as under the law a *fi. fa.* could issue upon; that it was no longer a twelve months' bond, its character, force and effect as such having been changed by taking additional security thereon after it had become due and should have been executed, making it really and in fact an ordinary bond or contract.

That by the acts of Forstall, plaintiff has been released upon said bond, even if he were ever liable upon it as security. That on the 5th day of June, 1887, when said bond was due and exigible, execution should have issued upon it, and the property for which it was given should have been seized and sold; but instead additional security was taken thereon and its collection extended to November following, about five months, with the distinct understanding and instruction of plaintiff that its collection should then be enforced if he was bound upon it, which he avers he was not if it became the property of Forstall. That at that time Taylor held possession of all the stock and other property for the purchase of which the bond was given, and the amount of the bond could easily have been made by the sale of them under it; but instead of proceeding to the collection of the bond at that time, Forstall allowed the time of payment by Taylor, the principal thereon, to be extended from month to month, and year to year, without plaintiff's consent, and in fact against his express wish and instruction, until a large portion of said property had been disposed of by Taylor and he became insolvent, and now Forstall illegally endeavors to hold plaintiff responsible therefor and require of him to make good the loss, if any, which he had sustained by his own acts; but that he has been informed and will show that the debt for which said bond was executed as claimed by Forstall has been extinguished, and really and in fact Mrs. Taylor is not indebted to him in any amount.

Alleging that the sheriff unless enjoined would sell his property under the writ, and that he, the plaintiff, had been damaged by the seizure to the amount of five thousand two hundred and fifty dollars, he prayed that the said sale be enjoined, that the sheriff and Forstall be cited, and that he have judgment in his favor decreeing him re-

leased from any liability upon said bond—that the injunction be perpetuated, and that he have further judgment for the amount of the damages claimed.

The sale was enjoined as prayed for.

Forstall answered, first pleading the general issue. He then admitted that he, together with Charles Hernandez, own the twelve months' bond referred to, and averred that the same was a just and binding obligation of plaintiff, and exigible in manner and form attempted by him and Hernandez.

He admitted that he, together with Hernandez, caused the seizure of plaintiff's property under *fi. fa.* issued on said twelve months' bond, which the principal and security refused to pay. That he and Hernandez, being joint owners of the bond, had the legal right and a just cause to proceed as they did. Reserving his right to demand damages from plaintiff and his sureties on the injunction bond, he prayed that plaintiff's demand be rejected and the preliminary injunction be dissolved.

Charles Hernandez, with leave of court, intervened in the suit, and averring that he is equally interested therein with A. J. Forstall, for the reason that they together own the twelve months' bond, execution on which had been enjoined, he adopted Forstall's answer and allegations and joined also in his prayer.

The case went to trial and judgment was rendered therein perpetuating plaintiff's injunction and condemning defendant to pay $250 attorney's fees.

Defendant and intervenor have appealed from the judgment.

In order to reach a clear understanding of the position of the parties, it will be necessary to make a statement of facts which are somewhat complicated.

On the 25th of January, 1884, Mrs. Lizzie M. Taylor, wife of F. M. Taylor, executed her mortgage note of that date for $5000, to her own order and by her endorsed, payable on the 1st January, 1885, with interest at 8 per cent. per annum from maturity, and secured payment of the same and 10 per cent. attorney fees in case of suit by a mortgage on her plantation, known as the Live Oak plantation, in the parish of East Carroll, with mules, etc., thereon.

On the 21st day of February, 1885, she mortgaged the same property to secure two promissory notes of $4000 each, to her own order and

by her endorsed, payable one year after date, with interest at 8 per cent. after maturity and 10 per cent. attorney fees in case of suit.

On December 4, 1885, a number of the creditors of Mrs. Taylor sued her, accompanying their demands for a moneyed judgment by applications for writs of attachment against her property, which writs having been granted and issued were executed, some upon the Live Oak plantation and others upon that plantation and a stock of goods belonging to her in her store at Lake Providence.

On December 8, 1885, Anatole J. Forstall, as owner of the note above described of Mrs. Taylor for $5000, instituted proceeding *via executiva* thereon, and under the same the Live Oak plantation and the mules, farming utensils, etc., thereon were seized.

W. G. Vincent and other attaching creditors thereupon intervened by way of third oppositions, which (as similar ones were again filed at a later period) are now simply referred to, and will be more particularly mentioned hereafter.

On the 26th April, 1885, Anatole J. Forstall, as holder of one of the two mortgage notes of $4000, and Charles Hernandez, as holder of the other note, instituted proceedings jointly *via executiva* and the Live Oak plantation with the mules, carts, utensils thereon were seized thereunder, and under these writs it was advertised for sale. W. G. Vincent, one of the attaching creditors spoken of, who had already filed one "third opposition," now filed another, covering the same grounds as the first.

In the petition he averred that, finding that the property originally attached by himself was insufficient to cover his claim, he had applied for and obtained an order for a second attachment, directed to the sheriff of West Carroll parish, with instructions to seize sixteen mules belonging to his debtor, which, he had been informed, were then in that parish; that before process issued Mrs. Taylor caused the property to be brought to East Carroll and placed them on the West Oak plantation for the purpose of avoiding a seizure, and with a view of permitting them to be seized under the executory process of Forstall which had been previously levied on that plantation, the object being to shelter them from his (Vincent's) pursuit by having them embraced under said proceeding, which was a friendly suit conducted for mutual benefit of the litigants therein.

That as soon as said mules were placed on said plantation he had caused an alias writ of attachment to issue, and they were seized thereon.

That soon after he had caused them to be seized they were seized under the executory proceedings and were advertised to be sold thereunder.

That since his petition of third opposition was filed on the 5th February, 1886, Forstall and Hernandez, representing themselves as mortgage creditors of Mrs. Taylor, commenced proceedings against her in April, 1886, in which they are again attempting a sale of the mules, notwithstanding said mules had been taken out of the possession of Mrs. Taylor by an attachment which was prior to the last proceedings.

That said plantation without said mules was worth more than sufficient to pay the demands of Forstall and Hernandez, by reason of mortgage or otherwise. Charging fraud and collusion between Forstall and Hernandez and Mrs. Taylor, and that the real object of the executory proceedings was to overreach and destroy his rights, and to make a fraudulent and simulated sale of the Live Oak plantation and the mules for the benefit of Mrs. Taylor; that Forstall or Hernandez or some interposed party was to buy in said plantation and mules, ostensibly for cash, but actually to allow Mrs. Taylor in her own name, her husband's name or that of some interposed party to occupy and cultivate said plantation, and out of the crops make annual payments to Forstall and Hernandez of the small balance really due them on said mortgages, and ultimately preserve the property for the benefit of Mrs. Taylor, and attacking the claim set up by the mortgage creditors, third opponent prayed that if Forstall and Hernandez persisted in having said sale made that the sheriff be ordered to have the mules separately appraised and separately sold from the other property seized, and ordered to hold the proceeds of their sale in his hands until further order of court; that after trial had, the executory proceedings be decreed fraudulent and collusive; that the proceeds of the sale of the mules be ordered to be paid to opponents by the sheriff, in satisfaction of the judgment he would obtain in his attachment suit; that his rights as attaching creditor be recognized and maintained, and as being superior in rank to all others as regards said mules and their proceeds.

This opposition was quickly followed by others of a similar character on the part of other creditors, and under and by virtue of them the mules were ordered to be withheld from sale under the executory proceedings, and to be appraised and sold separately, which order was subsequently carried into effect.

Pending the seizure the sheriff leased the plantation and mules to F. M. Taylor, the husband of the defendant—the lease of the plantation for the year 1886, at a rental of $2000, and the mules for a period and for a rental not shown by the record.

In the meantime, and after considerable delay, the plantation was sold on the 17th day of July, 1886, on twelve months' bond, and adjudicated to Forstall, for $10,000, he paying the sheriff the costs of proceeding, giving his twelve months' bond for $7000, to cover the possible eventual rights of the various third opponents, and retaining the balance as mortgage creditor.

Some of the ordinary attaching creditors having succeeded in obtaining judgments on their claims, writs of *fi. fa.* were issued thereon, and under them the mules were seized, and, together with some movable property, were, under those seizures, and those of Forstall and Hernandez, sold on twelve months' credit to F. M. Taylor, for the sum of $2400, for which he executed his twelve months' bond as purchaser, with V. M. Purdy as security.

The issuing of the writs of *fi. fa.* brought about the filing of a number of third oppositions in the matter of the last sale, the different parties claiming priority of payment, among them Forstall and Hernandez.

We may say here that that litigation terminated adversely to the third opponents and favorably to Forstall and Hernandez, adjudging to the latter the twelve months' bond, the proceeds thereof to be applied to the payment of their mortgage claims.

On the 29th November, 1886, after Forstall had become the adjudicatee of the Live Oak plantation, an agreement was entered into between Forstall and Hernandez and Mrs. Taylor, as follows:

It is agreed and understood between Mrs. Lizzie M. Taylor, of Lake Providence, La., and Anatole J. Forstall and Charles Hernandez, of New Orleans, La., that whereas the Live Oak Plantation, in the parish of East Carroll, was purchased in July, 1886, by said A. J. Forstall, for ten thousand dollars, at a sheriff's sale thereof in the suit of Forstall and Hernandez vs. said Mrs. Lizzie M. Taylor, and whereas the parties hereto hereby appraise said property at $15,000, and verily believe that the same could be sold at that price at some future time. The said Forstall and Hernandez both hereby agree that at any time within five years that the said Mrs. Taylor shall pay to them the amount due them, they should transfer said property to

her or to any person whom she shall designate. The said Mrs. Taylor obligates herself to pay to the said Forstall and Hernandez the amount she owes them, which amount shall be determined in the suit now pending in East Carroll, entitled A. J. Forstall and C. Hernandez vs. Mrs. Lizzie M. Taylor, said interest to be paid annually, on the 1st day of January of each year.

Mrs. Taylor, moreover, binds herself to pay yearly, as they shall become due, all the taxes on said Live Oak plantation. Forstall and Hernandez agree that they shall rent the said plantation and credit Mrs. Taylor with the rent on account of her said indebtedness to them. They further agree that at any time they shall find a good purchaser for said plantation, to sell it for fifteen thousand dollars, out of which amount they shall deduct the amount due them by said Mrs. Taylor, and turn over the balance to her. In case any part of this agreement is not complied with, the same to be null. Thus done and signed at New Orleans, La., this 29th November, 1886.

(Original signed) F. M. TAYLOR,
Agent of Mrs. Taylor.
A. J. FORSTALL.
CHARLES HERNANDEZ.

About the time the twelve months' bond fell due (5th June, 1887), the litigation relative to the mules being then pending and undetermined, a question arose as to whether it should be then executed or not, and a conference took place between some of the attorneys representing the third opponents in that proceeding and F. M. Taylor. As a result of that conference execution of the bond was stayed until the issues raised in the third oppositions should be disposed of, provided J. B. Donnally should sign the bond as additional security, which was done. Forstall and Hernandez do not seem to have been a party to that agreement. Whether Purdy was present or not at the conference is immaterial, as he concedes in his pleadings that he consented to the extension.

No action was taken upon the bond so far as Purdy was concerned until it was filed in court and the *fi. fa.* issued upon it, under which the seizure was made which gave rise to the present controversy.

F. M. Taylor, who had purchased the mules, subsequently to that purchase bought one-half of a plantation in East Carroll, mortgaging the property for payment of the price.

He disposed of four of these mules—not accounting to Hernandez and Forstall for the proceeds. The balance were placed by him on the property purchased, and falling under the operation of the mortgage, the proceeds of the sale thereof, when they were afterward sold in the execution of the bond as against Taylor, were adjudged to his vendor.

Referring to Purdy's petition it will be seen that he claims that the indebtedness of Mrs. Taylor to Forstall and Hernandez (which so far as the record has not up to the present time been fixed by a personal judgment against her) was extinguished.

The basis of this claim is the action of Forstall and Hernandez relatively to the Live Oak plantation after the agreement between them and Mrs. Taylor. On this subject counsel of plaintiff say in their brief: "Under the terms of that agreement Messrs. Forstall and Hernandez are now indebted to Mrs. Taylor. They agreed in said contract they would pay to Mrs. Taylor all in excess of $10,000 that they gave for her Live Oak plantation, if they could find a purchaser for said named place, provided that the sale could be made within five years from the date of the contract.

"The records show that Forstall sold to Hernandez, both of whom were contracting parties with Mrs. Taylor. The records further show that Hernandez made Joseph E. Ransdell his agent to sell this Live Oak plantation, and that Ransdell, as agent, has sold 919 acres of land out of the 960 tract, and that he sold it at the price of $28,894, having still left 41 acres that he has not sold.

"Even if the sworn statement that Forstall has made is correct, he and Hernandez would owe Mrs. Taylor about $18,000 after she has paid them every cent that she owes them. The evidence shows she was in possession of Live Oak plantation at the time it was seized and sold. She made and gathered a crop that year. Forstall allowed her to keep the place after he had it sold and he bought it. He furnished her plantation supplies that year, and it was to his interest to assist and aid Mrs. Taylor. There was an express understanding between F. M. Taylor and Forstall that Taylor was to buy the work stock when sold, so that they would be kept upon the plantation, in order to cultivate and complete the crop they had planted. Forstall had written a letter to Taylor requesting that he would get some one to go on a bond for him if he purchased the property."

"The evidence shows that in 1886, the year that she made this contract, and the same year of all these transactions, Mrs. Taylor paid the interest and the taxes on the property."

"The following year, 1887, the plantation was rented to Dunn for the sum of $2000. This amount was collected by Forstall and Hernandez. This amount collected paid the interest on the plantation for that year, and there were about $900 over to go as a credit in the year 1888. Forstall and Hernandez then took the plantation out of the possession of Mrs. Taylor, thereby violating their part of the contract, placing it beyond the power of Mrs. Taylor."

"After Live Oak plantation was seized, the sheriff rented the plantation to Taylor for that year (1886) for $2000. That Taylor never paid one cent of this money to the sheriff, but the latter turned the money over to Taylor upon a written order of Forstall."

The "records" to which counsel allude are doubtless acts of sale of the Live Oak plantation and different portions thereof from Forstall to Hernandez, and from Hernandez to different persons, but they are not in the transcript.

We now turn to the consideration of plaintiff's contention that under certain circumstances he was not to be held liable on the bond, and that the circumstances have occurred which were to exempt him.

In a letter written by Forstall to Taylor under date of May 24, 1888, he said: "Mr. Hernandez is absent at present from the city, and, of course, under the circumstances, as he is interested with me in this matter of the Live Oak plantation, I can give you no positive answer until his return, which, I believe, will be in about a month, as he is now in Europe, but he expects to return soon."

F. M. Taylor testified as follows:

"I got Mr. Purdy to sign it (the bond) as obliging two parties, myself and Mr. Forstall. I told Mr. Purdy that he would run no risk, as I was Mr. Forstall's duly authorized agent, and I showed him the power of attorney offered in evidence (from Forstall to Taylor).

"I accepted the terms and conditions of the power of attorney and on various occasions acted by its authority. I transacted all of Mr. Forstall's business for him in this parish—collected debts for him, authorized suits to be brought for him. I looked after his business in every particular the same as if he had been present. I brought suit against V. M. Purdy (another suit) for him, closed out the Larch business for him, and bought the Therrel store for him—bought it in my own name, but it was virtually for him.

"The check I gave Mr. Therrel for his store and fixtures I sent to Forstall, and had him credit Therrel's account with it. At the time the mules were seized, Forstall had a bill of sale for the mules. There was an agreement between Mr. Forstall and myself to wait until Hernandez should return from Europe. The letter (of May 24, 1888) was in answer to one I had written in regard to Mrs. Taylor's business—I represented her as well as Mr. Forstall—with request that Mr. Forstall come up and settle up the business, and show what Mrs. Taylor's indebtedness was to him. There was an agreement between Mrs. Taylor and Forstall and Hernandez—it included the Live Oak plantation. In connection with my evidence I offer document "D" (agreement between Mrs. Taylor, Forstall and Hernandez). The reason for extending the twelve months' bond, I suppose, was Forstall and Hernandez were waiting until the Live Oak plantation was sold so they could make a settlement with Mrs. Taylor. I don't know this positively, I presume this to be the case. At the time I had an understanding with Forstall about extending the time for collecting the twelve months' bond—it was about twenty-three months after the bond had been given—the rent on execution was not issued on the bond when due. I suppose Forstall was waiting to have a settlement with Mrs. Taylor. The mules were all in my possession and I had bought additional stock and farming utensils. As agent for Mrs. Taylor I have never made a settlement with Forstall and Hernandez. I had nothing but a verbal agreement with Forstall. I represented Forstall and Mrs. Taylor at the same time. The verbal agreement between Forstall and myself was made in New Orleans. Mr. Forstall told Mrs. Taylor and myself that he would not see her suffer, but would provide for her to have $4000 or $5000 in case of failure in business on her part. I had a written agreement with Forstall (but have lost it) that in any event the mules would belong to Mrs. Taylor. The bill of sale to Forstall of the mules was given as collateral to be placed in bank by Forstall—the mules were bought by Forstall, for which he gave his check on the bank. This check was sent to the bank and in return got a bank check for it, which I handed Forstall. I did not get any of the proceeds of the check.

"At the time of the sale (of the mules) I was cultivating the Live Oak plantation for my own account. I had rented the mules from the sheriff and was in possession of them at the time of the sale, and protested against the sale."

On re-examination, the following question was asked the witness:

Q. "When you went to Mr. Purdy and asked him to give his consent for the extension of payment of the twelve months' bond, did you not, as agent of Mr. Forstall, represent to him that in case the Circuit Court, which was to be held at an early day in this parish, should decide that Forstall was entitled to the proceeds of the twelve months' bond in preference to the other creditors of Mrs. Taylor, then, in that event, did you not tell him that the twelve months' bond was to be canceled?"

A. "I certainly intended to convey that impression, as I was acting for Forstall. Previous to the seizure of the Live Oak plantation the place had been in the name of Mrs. Taylor. In 1886 I rented the place from the sheriff. I agreed to pay $2000 rent, for which I gave my note. The sheriff returned the note to me on an order from Forstall and Hernandez. I never paid the sheriff for the note. When Forstall made the contract with Mrs. Taylor they gave me an order for the return of my note. In compliance with the contract I was to pay the taxes due, which I did. I furnished the supplies to make the crop on the place that year. Forstall and Hernandez have not complied with their contract. If they had complied with their contract I think they would be considerably indebted to Mrs. Taylor. She has complied with the contract after the sale of the Live Oak. She considered that she had paid the interest and taxes from the rents collected from Mr. Dunn, who had the place in 1887, and from the rent she considered there was sufficient amount to pay the interest and taxes for 1888 and 1889, from the fact that Forstall never made any demand on me as her agent for interest or taxes for 1886. There was no interest or taxes due, as this contract was not made until November, 1886."

The plaintiff, Purdy, testifies as follows:

"The day the mules were sold Mr. Taylor came to my place of business and asked me as a special accommodation to himself and Forstall to go on the twelve months' bond for the mules that he had bought that day, showing his power of attorney from Forstall authorizing him to secure bonds for him. The power of attorney shown me is the same as that offered in evidence. Mr. Taylor told me it was more to Forstall's interest to sign the bond than it was to his. He stated that he had leased the mules and implements for the year,

and it would be the means of destroying his prospects if they were taken off the place."

Being asked the question whether, at the time of the extension of the bond, when it was about to mature, Taylor had not told him, as agent of Forstall, that in case the court should decide that Forstall and Hernandez were entitled to the proceeds of the twelve months' bond in preference to the other creditors, that then in that event the twelve months' bond was to be canceled, he answered, "I certainly so understood it; all of the cases were decided in favor of Forstall."

The power of attorney from Forstall to Taylor bears date the 12th of December, 1883. It gave Taylor full power and authority to represent him and to attend to all his business and concerns in the parish of East Carroll and elsewhere, of every nature and kind whatever * * * to take in payment from whom it may concern any form or kind of movable or immovable property and dispose of the same to others by sale or otherwise; to ask, demand, have and take and by all lawful ways and means to recover and receive from whom it may concern all and every such wares or goods, debts, property and effects whatsoever as is now or may be in his or her or their custody and possession due, owing or belonging to him, this constituent, whether by bond, bill, note, book, debt account, consignment, bequest or for and by what other reason or means soever, and to that end, to whom it may concern, to adjust and settle all accounts, and upon recovery and receipt in the premises to make and give good and sufficient receipts and acquittances; to appear before all courts of law and equity, there to do, prosecute and defend as occasion shall require, or to compromise, compound and agree in the premises, by arbitration or otherwise, as the said attorney in his discretion thinks proper; also to apply for and obtain any attachments or sequestrations, injunctions, appeal and provisional seizure, give the requisite security, sign the necessary bonds and make and subscribe thereon all affidavits, and generally to do and perform all and every other matter that shall or may be necessary, and bind the said constituent as firmly as he himself might do if personally present."

Under date of July 12, 1886, a few days previous to the sale of the plantation and of the mules, Forstall wrote to Taylor as follows:

"DEAR SIR—I confirm mine of the 9th inst. Live Oak is to be sold on the 17th, and I will be required to furnish two bondsmen.

Can you specify any two parties in your city who will act in that capacity for me? If you find two who are willing to do this send me their names at once, as the time is very short before the sale. Let me hear from you immediately and oblige,

"Yours truly,

"A. J. FORSTALL,

"*Per Rareshide.*"

The defendant, Forstall, testified as follows:

"V. M. Purdy's allegation in the injunction is not correct. F. M. Taylor did not act as my agent with plaintiff. I do not know anything as to the agreement entered into between Taylor and Purdy, but I authorized Taylor to make no such agreement, and in fact was very sorry when I heard that Taylor had purchased these articles under a twelve months' bond, because I knew we would have trouble to make him pay. From the time I issued executory process in said suit up to the sale I had no conversation or interview with him, and certainly never authorized him to act for me. Taylor was not my agent for any purpose whatever. I had nothing to do with said bond. I did not authorize Taylor to obtain security on said bond. I never induced Taylor to purchase said property. I never held out directly or indirectly, through Taylor or any one else, inducements to Purdy or Donnally in order to obtain them as sureties. I am not responsible for what Taylor may have told them, but if he did speak for me he was not authorized by me to do so. I never did or said anything to make Purdy understand I would not hold him on said bond."

OPINION.

The theory upon which the plaintiff, Purdy, as security upon the twelve months' bond, furnished by Francis M. Taylor, as adjudicatee of the lot of mules purchased by him, in the proceedings of Forstall and others against his wife, has enjoined the seizure of his own property is that when Mrs. Taylor was threatened with ruin by the numerous attachments against her, her friend, Anatole J. Forstall, holding the vantage ground of being mortgagee of her Live Oak plantation, went to her assistance by foreclosure proceedings, under which he was to buy in that property, with the mules, carts, farming utensils thereon, at a price within his claim, and by arrangements to be perfected subsequently to his purchase he was to secure his own debt, enable her to pay out, but at the same time guard her against

her other creditors. That this plan was disarranged by the proceedings of the third opponents, who succeeded in obtaining a sale of the mules separately from the plantation. That this severance placing Forstall in a position of possible danger of personal liability on the twelve months' bond, which had to be furnished at the sale, should he buy himself, inasmuch as the third oppositions might be determined adversely to his mortgage rights on the mules, it was agreed that F. M. Taylor, the husband, should purchase the mules with the understanding that if the third opponents won their suit Forstall was to disappear entirely from any connection with that sale and Taylor was to bear all the consequences of a purchaser, but should Forstall, win the suit Taylor was to be considered as having purchased for Forstall. The mules were to be replaced on the plantation, and matters were to be placed on the same footing as if severance had not taken place and Forstall had bought both lands and mules at once under his mortgage claim. That under such a condition of things Purdy was to be released, or not looked to as Taylor's surety on the bond. That Forstall having bought the plantation, and having won his suit as to the mules, matters had taken the shape to entitle him (Purdy) to demand that he be not proceeded against.

In view of the friendly relations between the Taylors and Forstall, and the actual execution of an agreement between Forstall and them so nearly identical with that foreshadowed by W. G. Vincent in his third opposition, it can not be denied that plaintiff has placed his case inferentially very strongly before the court, and we were at one time disposed to take his view of the situation, but on more mature deliberation we do not think the judgment of the lower court sustaining it can be maintained for several reasons.

In the first place, the mules having been sold under the writs of a *number of creditors* on terms of twelve months' credit with security, it is clear that when Taylor bid them in he became their actual owner. Their ownership in the interval between the sale and the termination of the third opposition proceedings could not be swinging in a balance to rest finally upon Taylor personally, should the third opponents have judgment in their favor, and upon Taylor as an agent of or interposed party for Forstall, should judgment go against the opponents. Taylor was undoubtedly the absolute owner of the mules, and Purdy undoubtedly his surety as such for the purchase price. We have very critically examined the pleadings and the evidence and we

think that the plaintiff himself and the Taylors concede this to be the fact. Plaintiff's contention is that, although this was the case, none the less by a collateral agreement between himself and Taylor, as agent of Forstall, he was not to be proceeded against should Forstall have judgment in his favor in the matter of the third oppositions.

If Taylor was the actual owner and actual debtor, and Purdy his actual security, then the claim is that their absolute obligations evidenced by a contract of so high a nature as to be executory at once on default, by *fi. fa.*, should be done away with so far as Purdy is concerned by a side agreement.

Such a claim as this would necessarily have to be supported by very strong evidence. We do not think it has been furnished. The side contract which plaintiff sets up rests, in the first place, solely on parol evidence, which, although permitted to be received without proper objection to the same, was, as we shall hereafter show, of the weakest character. Taylor had been the agent of Forstall by a notarial power of attorney, antedating all these proceedings, but the agency evidently was not intended to cover a case where Taylor himself and Taylor's wife were personally concerned—it obviously had reference to dealings with parties other than Taylor and his wife; but even were this otherwise, the powers given to Taylor in the act did not extend to making any such a contract or such arrangements as plaintiff contends for.

Again, Taylor occupied a very peculiar position in relation to all these proceedings, for even if the parties were all acting in accord they, to a certain extent, in the nature of things, had adverse interests.

Taylor claims to have represented both the creditor, Forstall, and the debtor, who was his own wife, and he was at the same time the debtor himself on the twelve months' bond in which both Forstall and his wife had an interest. Arrangements by a person holding such conflicting interests are, to say the least, very questionable. To hold that there was such an arrangement as Purdy asserts, we have to leave the notarial act of agency, or use it only to an exceedingly limited extent, and rest our conclusions upon the actions and relations of parties, and upon parol evidence to destroy written obligations.

But leaving all this aside, we do not think the testimony supports Purdy in contending that there was any agreement between Taylor and himself prior to his becoming surety, such as he now declares on. What occurred at that time is practically covered by Taylor's testimony to the effect that he got Mr. Purdy to sign it (the bond) as obliging two parties, himself and Mr. Forstall; that he told Mr. Purdy that he would run no risk, as he was Mr. Forstall's duly authorized agent, and that he showed him the power of attorney offered in evidence, "and by Purdy's testimony that when he received the power of attorney he exhibited it to his own attorney, and on his advice that he could safely sign, he did so."

In Purdy's own statement he says: "The day the mules were sold Mr. Taylor came to my place of business and asked me as a special accommodation to himself and Forstall to go on the twelve months' bond for the mules that he had bought that day, showing me his power of attorney from Forstall, authorizing him to secure bonds for him, the power of attorney being the same offered in evidence. Mr. Taylor told me it was more to Forstall's interest to sign the bond than it was to his. He stated that he had leased the mules and implements for the year, and it would be the means of destroying his prospects if they were taken off the place." Being asked the question whether at the *time of the extension of the bond*, when *it was about to mature*, Taylor had not told him that in case the court should decide that Forstall and Hernandez were entitled to the proceeds of the twelve months' bond in preference to the other creditors, that then, in that event, the twelve months' bond was to be canceled, he answered: "I certainly *so understood it;*" and this same question having been asked of Taylor, he answered: "I certainly intended to *convey that impression*, as I was acting for Forstall."

We think the evidence does not show that an understanding was made with Purdy *at the time of his signing the bond* that under certain contingencies he was not to be looked to, and does show that Purdy's action rested upon an examination of Taylor's powers under the notarial act and an erroneous conclusion as to their extent, and not upon anything *dehors* that act. The first evidence looking to or tending toward such an understanding as plaintiff speaks of refers to a date much later than the date of sale. It refers to a *time when the bond was about to mature*, at which time Taylor was anxious for an extension, and obtained it with Purdy's consent—not from Forstall

nor from Hernandez, but from the attorneys representing the different plaintiffs in the third opposition proceedings, which proceedings were at that time still pending. It was those parties, and not Forstall or Hernandez, who were pressing for execution, and it was with those parties Taylor was then dealing. It was they who exacted Purdy's consent to the extension, and it was they who insisted upon the additional security being given upon the bond, which was secured by the obtaining the signature thereto at that time of Donnally. Taylor was clearly not acting for Forstall at that time, and Purdy had no reason to suppose that he was. If he thought proper to *receive* the "*impression*" that Taylor says he "*intended to convey*," he did so at his own risk, on the strength of misplaced confidence in Taylor. Even at that date matters even between Taylor and Purdy do not seem to have reached the point of any "contract" or "agreement" on the subject. Purdy's action in insisting upon what he now claims to have been a "condition" of his consent to an extension that the bond should receive execution immediately upon the termination of the opposition proceedings shows that he considered himself as *Taylor's actual surety at that time*, and then *bound absolutely upon it*, and his contention in this suit that he has been discharged *because* Forstall and Hernandez did not execute the twelve months' bond at that time as against Taylor shows the same fact.

With the evidence before us we do not feel justified in accepting as established the collateral agreement for discharge which plaintiff relies on, and in making that declaration it may be well to note that through the whole of the discussion *Hernandez' rights* in the premises have been utterly ignored. His rights are separate and distinct from those of Forstall. There is no pretence that he ever entered into any contract for Purdy's discharge, and from all we can see he is *prima facie*, at least, a creditor of Mrs. Taylor for a much larger amount than this bond would cover.

We now consider the claim of plaintiff that time was given to Taylor by Forstall without Purdy's consent. We have already said that to the extension of time granted at the maturity of the bond neither Forstall nor Hernandez were parties. To this extension Purdy expressly agreed. Taylor in one place in his testimony says that Forstall agreed, verbally, in New Orleans to give him time. What he says on the subject is said so loosely that we attach no importance to the statement. We think it quite likely Mr. Forstall may have,

without any intention of binding himself, declared his intention to hold matters in abeyance until Mr. Hernandez should return from Europe.

A mere declaration of that character is not the granting of time referred to in Art. 3063 of the Civil Code as carrying with it the release of a surety. There is no pretence that there was ever even a "promise" to postpone, but had there been it would fall under the terms of Art. 1815, which declares that a positive promise that from the manner in which it is made shows no serious intent to contract creates no obligation.

The failure of Forstall and Hernandez to execute the twelve months' bond promptly at maturity did not discharge Purdy. A mere forbearance or delay in enforcing their rights did not have that effect—he could have paid the debt, and becoming subrogated to their rights he could have controlled the claim to his own satisfaction. Hennen's Digest, p. 1541.

Plaintiff next claims that subsequently to the purchase of the Live Oak plantation by Forstall the latter and Hernandez entered into a written agreement by which Mrs. Taylor was to remain on the plantation, exercise certain rights of ownership thereon (but short of ownership), and ultimately become, under certain contingencies, the owner of the property; that Mrs. Taylor had complied with all her obligations under this contract, up to a certain period, when suddenly, without right so to do, Forstall sold the property to Hernandez, and Hernandez sold the same to different parties, placing it out of Mrs. Taylor's power to finally comply with the balance of her obligations.

That one of the clauses of this contract so broken up was that in the event Forstall and Hernandez should find a purchaser within a certain time for the plantation, and should sell it for over a certain amount, that the surplus over that amount should be paid to Mrs. Taylor—that the price on which the property had been sold not only exceeded the amount fixed, and paid off all the indebtedness of Mrs. Taylor to Forstall and Hernandez, but left a large balance which she was entitled to receive from them.

Up to the present time Mrs. Taylor (who is no party to the present litigation) has asserted no such claim that we are aware of against Forstall and Hernandez. We can not collaterally in this suit settle or liquidate the rights of Mrs. Taylor under that contract. Purdy is

not authorized to advance claims for or stand in judgment for her. We can not undertake to say what the rights of parties would be were she to do so herself at some future time, and the condition of affairs should prove such as plaintiff represents.

For the reasons herein assigned, it is hereby ordered, adjudged and decreed that the judgment of the District Court be and the same is hereby annulled, avoided and reversed, and that plaintiff's demand be and the same is hereby rejected, and the injunction taken out by him be and the same is hereby dissolved, costs in both courts to be paid by appellee.

Rehearing refused.

No. 11,178.

SUCCESSION OF MRS. E. F. LEWIS.

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1. The court maintains the rules laid down in Miller vs. Handy, 38 An. 160, as regulating purchases on credit by a wife in community; but when a wife has so purchased and has actually paid, out of her own funds, two-thirds of the purchase price, besides all interest, taxes and expenses, and has held and administered the property in her own right for more than sixteen years, and for six of them after the death of her husband; when her husband went into bankruptcy and omitted this property from his schedule without complaint from any creditor; when the inventory of his succession omitted it without any such complaint; when the wife has died without any attack on her title, we consider that the laches and long acquiescence of the husband's creditors till after her death would relax the rigidity of proof ordinarily required in such cases, and that the evidence in this case would, under such circumstances, suffice to defeat an attack by them, which, however, has never been made or threatened, and is only suggested by an adjudicatee as an objection to accepting the title.
2. In this case the heirs of the husband are also sole heirs of the wife and are interested in maintaining the latter's title.
3. There would be no motive for attack by creditors in any event, because the unpaid price and restitution of wife's paraphernal funds would about absorb the value of the property.

APPEAL from the Civil District Court for the Parish of Orleans. *King, J.*

C. L. Walker for the Executor, and *Chrétien & Southon* for the Public Administrator, Appellees.

As to title to property purchased by a wife and deeded to her, the fact of ownership, of record and of public information being unquestioned and undisputed by the husband for more than nine years preceding his decease, or by any creditor or heir for seventeen (17) years, is sufficient, even in view of Arts. 2405 and 2402, Civil Code, to overcome any presumption as to any claim of the community or of the husband's estate against the same.

Article 2405, Civil Code, which provides that all effects which husband and wife reciprocally possess are presumed common effects or gains, unless it be satisfactorily proved which of such effects are otherwise acquired, in itself affords the right to the surviving marital partner to maintain his or her title by such evidence as is usually admissible in ordinary actions.

When it appears from the evidence that property bought during marriage, by the wife and in her name, with the authority of her husband, who was a party to the deed of sale, was paid for out of money that belonged to the wife, neither the executor of the husband nor any devisee of the husband, who is not his creditor or forced heir, can contest the widow's title to the property, and set up that it is community. Drumm vs. Kleinman, 31 An. 124.

The actual possession as owner of immovable property, purchased and recorded in the wife's individual name for more than ten (10) years (in fact for seventeen (17) years), constitutes under Art. 3478, Civil Code, such "possession in good faith and by a just title" as to amount to sufficient proof of ownership as might be required by Art. 2405, C. C.

The recorded title of the wife and the possession by the wife during the existing of the matrimony, however incomplete or inchoate, is a fact as any other fact, ultimately depending on proof, and is not an absolute nullity; such incompleteness does not vest the title in the husband, nor in the community through him as its head; the decedent's estate has only a right of action for one-half of the property or its contribution to the extent of one-half of its value.

Chas. F. Claiborne for Appellant:

Declarations in an act of sale to the wife that the property was purchased for her account, and with her own separate and paraphernal funds, are binding only upon the husband and his collateral heirs, but do not affect his forced heirs nor his creditors. Bachino vs. Coste, 35 An. 570; 1 L. 206; 9 R. 214; 10 An. 686, 784, 739; 11 An. 326; 28 An. 314; 31 An. 126; 33 An. 612; 34 An. 374.

The law presumes the existence of the community of acquets and gains; a stipulation to the contrary must be proved. C. C. 2399 (2369), 2405 (2374).

All property purchased during marriage, "even though the purchase be only in the name of one of the two and not of both," is presumed to be common, "because in that case the period of time when the purchase is made is alone attended to, and not the person who made the purchase." C. C. 2402 (2371).

The title being taken in the name of the wife does not even raise a presumption in her favor. 9 R. 214; 7 An. 104; 29 An. 76; 30 An. 170.

Even though the title specifically declares that the price was paid with her separate funds under her administration accruing to her from a designated source. 1 L. 206; 5 An. 741; 11 An. 326; 18 An. 126; 20 An. 531; 30 An. 169; 33 An. 612; 35 An. 570.

The burden of proof is upon the wife, or heirs, or assigns, to establish affirmatively and clearly that she paid with her own separate funds, under her own separate administration. 17 L. 300; 12 R. 582; 2 An. 763; 5 An. 611; 8 An. 286; 12 An. 598; 15 An. 119; 16 An. 214; 20 An. 532; 21 An. 344; 24 An. 521; 30 An. 170; 35 An. 570.

Even when the act contains specific mention thereof, giving derivation of funds. 1 L. 206; 11 An. 326; 18 An. 126; 20 An. 531; 33 An. 612; 30 An. 169; 5 An. 741; 35 An. 570.

The husband alone, and not the wife, is liable upon notes furnished by the wife for part of the price of property purchased in her name during the community, when her means did not justify a reasonable hope of her ability to pay them—

upon the ground that the purchase is one made really for account of the community, for whose debts the husband alone is liable, and that the wife can not bind herself for the debts of her husband or of the community. C. C. 2398; 12 R. 582; 2 An. 806; 6 An. 57; 10 An. 30; 12 An. 350; 13 An. 593; 19 An. 250; 29 An. 76; 32 An. 907; 34 An. 977, 1063; 33 An. 160 (167).

A purchaser can not be made to take a title which is not unquestionably good and which is suggestive of litigation. James vs. Meyer, 41 An. 1100; Succession of Justus, No. 11,061 N. R.; Succession of Dumestre, 40 An. 571 (574).

The opinion of the court was delivered by

FENNER, J. This is a proceeding to compel compliance by the adjudicatee with an adjudication made of certain property sold at public auction under an order of court in this succession.

The defence is:

"That neither the deceased nor her succession was owner of the whole of said property; that said property was purchased from the heirs of J. Waterman and wife by act of A. Hero, notary, dated April 8, 1876, in the name of Emma Frayser, wife of Robert N. Lewis; that said property was therefore owned by the community existing between the said Emma Frayser and her said husband, Robert N. Lewis, and that it could be sold only by him or in his succession, and was liable for the payment of his debts; that the said R. N. Lewis died on March 31, 1886, leaving three minor children, and debts exceeding in value the amount of the assets, as appears by record No. 17,608 of the Civil District Court."

After a careful study of the evidence in the record we find no reason to disturb the finding of facts as made by the careful judge *a quo*, which he states as follows:

"Mrs. Emma F. Lewis, then the wife of Robert N. Lewis, acquired the property sold, 185 St. Charles street, on April 8, 1876. There was no separation of property; the community of acquets and gains existed between her and her husband, Robert N. Lewis; the act recites that she purchased with her own separate and paraphernal funds, derived, as she declared, from her father, Dr. John A. Frayser, of Memphis, Tenn.; the purchase price was $9800, of which $2450 was paid cash, the balance on terms of credit, secured by vendor's lien, and evidenced by thirty notes. Mrs. Lewis, at the time of the purchase, received from her father $2500, and subsequently, for the purpose of paying the mortgage notes, $1400; her father and husband were both at that time wealthy. It was clearly the intention of Mrs. Lewis to acquire a home, and thus provide against her husband's future financial embarrassment.

"Mrs. Lewis and her husband lived in the house from 1876 to about 1883.

"In 1882, Robert N. Lewis failed. On May 22, 1883, he took the benefit of the insolvent laws of this State, and was adjudicated, in suit No. 8653 of this court, an insolvent. The property sold herein was never included or mentioned in the insolvent proceedings. On the 29th of March, 1886, Lewis died. His succession was opened in this court and numbered 17,608. The property in controversy was not inventoried or referred to in the succession proceedings. His succession was insolvent.

"On the 22d of February, 1892, Mrs. Lewis died. From 1884 to the date of her death the property, with the furniture therein, was rented by Mrs. Lewis, individually, or by her agents, for her account. It was rented at $125 per month from 1884 to 1891, and after 1891 at $80 per month; Mrs. Lewis collected the rents herself, or they were remitted to her by her agent; the property was always assessed and the taxes paid in her name. Up to the time of her death, mortgage notes amounting to $8879.17, and the interest thereon, were paid; twelve notes amounting to $8470.83 are due and unpaid. There is no positive testimony as to who paid the notes, but the court is satisfied that they were not paid by the bankrupt husband, and concludes from the circumstances of this case and the presumption arising from the facts disclosed, that they were paid, as well as the purchase price, by the wife out of the money received from her father and the revenues of the property."

On these facts the judge maintained the wife's title, and the adjudicatee has appealed.

We are not disposed to depart from or to extend the rules carefully formulated by us in the case of Miller vs. Handy, as follows:

"It is difficult to lay down precise rules as to the limits within which the wife's liberty to purchase on credit should be restricted, but we think the following general propositions are reasonable, viz.:

"1. It should be regarded as essential that the wife should have some paraphernal funds to invest, because such investment is the foundation of her right to purchase.

"2. The cash so invested should bear such fair proportion to the total price of the purchase as to render it reasonably certain that the property purchased would furnish sufficient security for the credit portion of the price.

"3. The wife's paraphernal property and revenues should be ample to enable her to make the acquisition, with the reasonable expectation of being able to meet the deferred payments." Miller vs. Handy, 33 An. 160.

The two first rules are fully complied with in this case; but it must be confessed that the evidence would hardly be sufficient, under ordinary circumstances, to establish compliance with the third rule. But the circumstances in this case are unusual and extraordinary. We are confronted with the facts that Mrs. Lewis has actually paid about two-thirds of the price of this property, besides all the accruing interest, taxes and expenses; that she purchased it in her own name and as an investment of paraphernal funds under her own administration; that she has held and administered the property in her own right, under a title never questioned, for more than sixteen years; that when her husband went into insolvency, this property was not placed on his schedule and no creditor ever complained of its omission; that when her husband died, this property was not included in the inventory of his estate and no creditor objected; that six years after his death she has held and administered the property as her own, without question from any source; and that it is only after her death, when her lips are sealed, which might fully have justified her right, that this issue is, for the first time, raised—not by any creditor or heir, but by an adjudicatee who anticipates an improbable and, we think, an impossible disturbance of the title.

So far as the heirs of R. N. Lewis are concerned, they are the three children of his marriage with Mrs. E. T. Lewis, and are her sole heirs and sole testamentary legatees, and are obviously interested in maintaining her title.

So far as his creditors are concerned, if, after this lapse of time, any such remain, we think that, considering their *laches* and long acquiescence, up to the death of Mrs. Lewis, the rigidity of proof ordinarily required in support of a wife's title would be so far relaxed that the evidence contained in this record would suffice to destroy any attack which they could make upon it. We may add that, even if the property were held to be in the succession of R. N. Lewis, the unpaid mortgage and the satisfaction of Mrs. Lewis' paraphernal claims would about absorb its value.

On the whole, we see no reason to disturb the judgment.

Judgment affirmed.

No. 11,195.

C. V. THIBAUT, SHERIFF, VS. DR. N. M. HEBERT.

The "business of slaughter houses," as used in the license law of 1890, means the business of slaughtering animals for sale. It does not matter whether it is carried on in a house or in a shed, on his own property or on rented property; whether he slaughters his own animals or those of others—if the slaughtering is followed as a business, and is for public sale of the animals slaughtered, it is subject to the license.

APPEAL from the Third Justice of the Peace of Parish of Plaquemines. *Barry, J.*

Gauthreaux & Lory for Plaintiff and Appellee.

James Wilkinson for Defendant and Appellant.

The opinion of the court was delivered by

FENNER, J. A license is claimed from defendant under Section 9 of the license act of 1890, for "carrying on the business of * * * slaughter house." The case was submitted on the following agreed statement of facts:

"Defendant kills one or two beeves a week, which are raised or pastured on his Bohemia plantation; said beeves are killed under a shed, and afterward sold in his plantation store, for which he pays a license as retail merchant and liquor dealer on the public road. Most of these beeves are purchased originally in New Orleans."

From a judgment enforcing the license claimed the defendant appeals.

We think defendant pursues the "business of a slaughter house." The statement of facts shows that he slaughters animals regularly and continuously, and that he slaughters them for sale. Worcester defines slaughter house "a house where beasts are slaughtered for market," therefore the business of a slaughter house is the slaughtering of beasts for market or sale. This, we think, is the natural and common acceptation of the words and conveys the legislative meaning. A reference to the act establishing the slaughter house company, No. 118, of 1869, shows that the Legislature considered the "slaughter house business" to mean the slaughtering of animals "the meat whereof is destined for sale." The facts that the business

is conducted in a shed instead of a house, that the animals slaughtered belong to the party, and that the meat is sold in a public store carried on by him, do not seem to affect the case.

The Section 9 of the license act of 1890 embraced in the same paragraph various other businesses besides that of "slaughter house," such as the business of "cotton ginnery," and of "refining sugar and molasses," but it took pains especially to exempt "planters and farmers grinding and refining their own sugar and molasses, or ginning their own cotton or that of their tenants." It extended no such exemptions to persons who conduct the business of a slaughter house, thus making no distinction in favor of those who slaughter their own animals for sale. We can make no distinction where the law makes none.

Judgment affirmed.

Rehearing refused.

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No. 11,273.

THE STATE OF LOUISIANA VS. ROBERT HAGAN.

Without a bill of exceptions, although the ruling and the evidence adduced appear upon the face of the record paper, the refusal of a new trial by the court is not properly before the appellate court for review.

Orders to separate witnesses, and their enforcement are generally addressed to the sound discretion of the lower court.

Mayhem implies a permanent injury or crippling.

Less than mayhem, denounced as a crime, under Act 17 of 1888, has as clear and definite a meaning as mayhem, indicating the acts which are made punishable.

APPEAL from the Fourth District Court, Parish of Grant. *Ware J.*

M. J. Cunningham, Attorney General, and *R. E. Milling*, District Attorney, for the State, Appellee.

W. C. Roberts for Defendant and Appellant.

The opinion of the court was delivered by

BREAUX, J. The defendant was indicted under Act 17 of 1888, amending Sec. 794, for (with a certain dangerous weapon, to-wit: a razor) wilfully, feloniously and maliciously inflicting a wound less than mayhem.

He was found guilty and sentenced to imprisonment at hard labor for six months.

After an ineffectual attempt to obtain a new trial and to arrest the judgment, he prosecutes this appeal.

His counsel moved for a new trial, upon the following grounds:

That an order issued by the court to separate the witnesses for the State and those for the defendant, during the trial, had been violated by one of the witnesses who remained in the court room, heard part of the testimony and informed two of the witnesses, prior to their examination, as to what had been testified to by the witnesses he had heard in court.

Testimony was admitted over the objections of the prosecuting officer, offered for the purpose of proving the allegations of the defendant in his motion for a new trial.

After having heard the testimony the court overruled the motion.

To this ruling the defendant did not reserve any bill of exceptions.

In other words, the evidence upon which the motion for a new trial was denied by the court below and the motion for a new trial are not brought up by bill of exceptions.

In the absence of such a bill this court will not review the action of the trial court on a motion for a new trial in a criminal prosecution. State of Louisiana vs. Isaac Williams, 35 An. 742; State of Louisiana vs. Richard Comstock, 36 An. 309; State of Louisiana vs. Vincent, 36 An. 771; State of Louisiana vs. Jackson, 37 An. 467; State of Louisiana vs. Walker, 37 An. 560; State of Louisiana vs. Wire, 38 An. 684; State of Louisiana vs. Darrow, 39 An. 677.

Moreover, although not accompanied by the required bill of exceptions, we have given due consideration to the motion for a new trial, and to the testimony admitted, at the instance of accused, to prove the improper conduct of a witness, and the alleged error in overruling the motion for the new trial, and the consequent injury to the defendant.

The discretion of the lower judge does not seem to have been improperly exercised.

If the trial judge holds that the presence, during a short time, of a witness in court who may or who may not have informed other witnesses of the testimony he has heard was not prejudicial to the accused, the ruling does not present a question subject to review.

The order to separate the witnesses should be rarely withheld, but "the accused is not entitled to it as a matter of right."

"The right of excluding witnesses for disobedience to the order, though well established, is seldom exercised in America, but the witness is punishable for contempt." Grenleaf, Vol. I, Sec. 432.

"The better opinion, however, seems to be that this is not demandable *ex debito justitiæ*." Best's Principles of Ev., p. 621.

"In such case it seems if a witness remain in court in violation of the order, it is in the discretion of the judge whether or not he shall be examined." State vs. Gore, 15 An. 80.

It is a question addressed to the sound discretion of the lower court. State vs. Revells, 34 An. 381; State vs. Watson, 36 An. 148; State vs. Cole et al., 38 An. 845.

It is urged in arrest of judgment that a statutory offence, though resembling and nearly related to a common law offence, should be defined by the statute which denounces it, and that a prosecution could not lie under a statute which attempts to create, but does not define, a statutory offence.

The facts constituting the offence are set forth in the indictment with sufficient precision and particularity.

The offence was declared in the act of 1858, and incorporated in the Revised Statutes of 1870, as Sec. 794.

The law-making power by Act 17 of 1888 amended and re-enacted that section by a slight change as to the penalty, and adding the words wilfully and maliciously as element of the offence.

The crime of inflicting a wound less than mayhem was denounced in the 5th section of the act of February 12 of 1849. This act was subsequently amended and changed in some respects.

The jurisprudence of the State has always, since that date, considered that offence as distinctive, substantive and sufficiently defined.

Such is the tendency of the cases: State vs. Jacob, 10 An. 141; State vs. Ellis, 12 An. 390; State vs. Keogh, 13 An. 243; State vs. Taylor, 35 An. 836.

It is an offence in the interpretation of which nothing is left to the mere discretion of the judiciary.

Mayhem at common law consists in bodily harm to another person such as to render him less able to defend himself or to annoy his adversary, as distinguished from one which merely disfigures or does not disable.

At common law the latter is denounced and defined as an assault

and battery—*i. e.*, an assault and battery in which a wound less than mayhem is inflicted is denounced and a punishment provided.

In Louisiana certain wounds less than mayhem are separately classed—that is, assault and battery of an aggravated character, resulting in a wound less than mayhem, is denounced by the act under which the prosecution in this case was instituted.

The case of the State vs. Gaster, *ante*, *p.* ——, is relied upon by the defendant, in which we decided that the crime for which the defendant was prosecuted in that case was not denounced and defined by the statute relating to "any misdemeanor in the execution of their respective offices."

In the section of the statutes interpreted in State vs. Gaster it was attempted to denounce a crime by reference to a generic term.

It would have comprehended every crime in office less than felony, without precision or definition.

It would have included a number of different acts.

It would have created a sea of uncertainty as to all acts less than felony.

We therefore held: "But language of such wide and indefinite import as to leave absolutely uncertain what acts are within and what without the statutory prohibition, can not operate as a valid criminal statute."

In the case at bar the legislative intent is clearly expressed.

The essentials of the crime are set forth in the indictment and the defendant was amply informed of the charge he was called upon to answer.

We therefore maintain the order of the district judge, refusing a new trial, and overruling the motion in arrest, and decree that the judgment appealed from be affirmed.

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No. 11,271.

THE STATE OF LOUISIANA VS. ELIAS A. HARRIS.

The overt act or hostile demonstration of the deceased against the accused must be proved before the introduction in evidence of communicated threats.

The trial judge is clothed with discretion to determine whether a hostile demonstration had been made by deceased against accused.

The tendency of recent adjudications is to extend, rather than to narrow, the scope of the introduction of evidence as part of the *res gestæ*. As a general rule, when it is necessary to inquire into the general nature of the act committed, or the

intention of the party who did the act, proof of what the person said at the time of doing it is admissible evidence as part of the *res gestæ*, for the purpose of showing its true character. The general rule is that the declaration sought to be proved must be contemporaneous with the event sought to be proved as the principal fact; but when there are connecting circumstances they may, even when made some time afterward, form a part of the whole *res gestæ*.

An act can not be varied, qualified, or explained by a declaration which amounts to no more than a mere narative of a past transaction, nor by an isolated conversation, nor by an isolated act done at a later period.

On a difficulty which resulted in a homicide and in the conflict the ear of the deceased was bitten or torn off by the accused, it is admissible evidence to prove the finding of the severed ear on the ground where the conflict took place fifteen or twenty minutes thereafter, and the acts and declarations of the accused in relation thereto, when the severed ear was pointed out to him on the ground, are also admissible.

APPEAL from the Fourth District Court, Parish of Grant. *Ware, J.*

M. J. Cunningham, Attorney General, and *R. E. Milling*, District Attorney, for the State, Appellee.

R. P. Hunter for Defendant and Appellant.

The opinion of the court was delivered by

McENERY, J. The accused was indicted for murder and convicted of manslaughter and sentenced to hard labor. He appealed.

There are several bills of exceptions in the record.

No. 1 contains a variance of statement of facts between counsel and trial judge. On the repeated rulings of this court, we accept the latter's statement. It completely destroys the effect of the bill. The statement also shows that the district attorney withdrew his objection to the introduction of proof, without first showing an overt act on part of deceased, of threats communicated to the accused.

The second bill is as follows:

"When the State had offered the testimony of the witnesses Walter Neal and Fleet Tillman to show that after the difficulty between accused and deceased had occurred, and after the deceased had gone home, some two hundred yards, Fleet Tillman, the son of the deceased, returned to the house of accused to get his father's cap and a piece of the ear of said Tillman, deceased, which in the scuffle subsequent to the firing of the shot had been bitten or torn off by the

accused, and that the accused had kicked the cap toward the boy and told him to get out of his yard, and that on the discovery by the boy of the piece of ear lying on the ground, the accused had put his foot on it and stamped it. Counsel for accused objected to the introduction of said evidence as not constituting a part of the *res gestæ*, that the subsequent acts of the accused, away from and out of the presence of the deceased, and fifteen or twenty minutes after the difficulty was over, could not be connected with the difficulty itself in any way and that such proof could only be offered to prejudice the minds of the jury against the accused, and draw their minds away from the facts of the homicide, which objections were overruled by the court and the testimony admitted for the following reasons, viz.: the evidence shows that the only means Tillman had to prevent accused from shooting him again was to close with him, and in the scuffle that ensued the ear or a portion of the ear of the deceased was bitten off. The facts detailed in defendant's bill occurred so shortly after the shooting by accused as to constitute them a part of the *res gestæ* and are also admissible to show the feelings of the accused at the time of his attack upon the deceased."

The tendency of recent adjudications is to extend rather than to narrow the scope of the introduction of evidence as part of the *res gestæ*. As a general rule, when it is necessary to inquire into the general nature of the act committed, or the intention of the party who did the act, proof of what the person said at the time of doing it is admissible evidence as part of the *res gestæ*, for the purpose of showing its true character. The general rule also is that the declaration sought to be proved must be contemporaneous with the event sought to be proved as the principal act; but when there are connecting circumstances they may, even when made some time afterward, form a part of the whole *res gestæ*. 8 Wallace, 397; 55 Penn. 402; 57 Mo. 93; 34 American Reports, 479; 38 An. 459, 949; 44 An. 958.

Mr. Taylor, in the Law of Evidence, gives the fourth rule for the test of the admissibility of such evidence, as follows:

"That an act can not be varied, qualified, or explained by a declaration which amounts to no more than a mere narration of a past transaction, nor by an isolated conversation, nor by an isolated act done at a later period." Taylor on Evidence, paragraph 523.

The trial judge's statement is that the ear had been severed in the fight, and that this fact had been proved.

The finding of a piece of the ear on the ground, immediately after the difficulty, was a fact competent to be proved, to show the fact of the severance of the ear, and the wounds inflicted upon the deceased. The act of stamping upon the ear, and the refusal to give it to the boy, was a fact contemporaneous with the discovery of the ear, and inseparable from the narration of its discovery by the boy. The refusal to let the boy have the piece of ear was also competent and admissible evidence to prove that the accused endeavored to suppress evidence as to the fact of its having been torn or bitten off during the fight.

The incident of kicking the cap toward the boy, and ordering him to leave his premises, is so insignificant that it would be an absurdity and a denial of justice to disturb the verdict, because this fact had no reference to the principal one.

No. 3 was reserved to the ruling of the trial judge on the examination of a witness for the defence. This also is disposed of by the statement of the trial judge, who says that he does not "agree with counsel as to his statement in the bill. The cross-examination by the district attorney of the witness, Miss Arzela Harris, was confined strictly to matters and things testified to by the witness in her examination in chief."

No. 4. The consideration of this bill will dispose of the others, as they depend upon the fact whether or not the deceased had made a hostile demonstration against the accused. The witness was offered to prove a general threat to kill a man before sundown, made by the deceased, which would corroborate the communicated threat testified to by Arzela Harris, and also the overt act testified to by her of deceased against accused. The trial judge states that the ruling as to the general threat was in consequence of no overt act having been proved.

His ruling is not, therefore, within the doctrine enunciated in case of State vs. Williams, 40 An. 168.

The statement for the reasons for his rulings is thus given by the trial judge: "While Miss Harris, the daughter of the accused, did swear that Tillman (deceased) came into the house of her father with an ox whip, she was fully contradicted by Neal and Baden, both of whom swore positively that the accused, Tillman, did not come into the house that night, and made no threats whatever; that they were there at the time they say Tillman come in with the ox whip

and made threats, and that he did not come into the house and made no threats whatever. As to the evidence of Miss Arzela Harris, as to the overt act at the time of the shooting, it was shown by the testimony of Teddlie and Neal, that Teddlie shut the door when he went out on the gallery and took Tillman by the arm; that Harris came out the back way and from around the house; that there was no window in the front of the house; that Miss Harris, the witness, was in the house; that she was in the house during the whole difficulty, and could not have seen anything that took place; that they were positive she was not on the gallery nor in the yard at any time during the difficulty, and whose statements are corroborated by the evidence of the witness Walker, sworn for the defence, and who was in the house himself at the time of the difficulty, and did not see any part of the difficulty, and says that Miss Harris was in the house during the difficulty outside; and further she contradicted herself in this: on being first placed on the stand she stated she was on the gallery when the shooting took place, and being recalled afterward stated she was in the yard near her father when the shooting took place."

The trial judge's ruling is that he has the sole and exclusive right to determine, after the introduction of evidence, the extent of the overt act, whether or not it was a hostile demonstration against the accused.

The counsel for the accused contends that the jury are the judges as to whether the testimony introduced as to the overt act of the deceased amounted to sufficient proof of that fact, and as to whether at the time he fired the shot the appearance of danger to the accused was such as to have justified him in firing upon the deceased.

The witnesses for the State all say that the deceased on hearing footsteps behind him, on nearing the gate of accused's premises, turned partially around, when he was fired upon by accused. The testimony of Miss Harris is that at the time the shot was fired the deceased was facing the accused, having broken away from the party escorting him to the gate, and was advancing in a threatening manner upon the accused, and exclaimed: "By God; I will go into that house or die."

Since the case of State vs. Ford, 37 An. 443, the rulings of this court have been uniform, adversely to the proposition submitted by the counsel for the accused. 37 An. 489, 644, 782, 896; 39 An. 817; 48 An. 861; 42 An. 753; State vs. Christian, 44 An. 950.

In that case, State vs. Ford, this court said:

"There is a wide difference between *evidence* of an overt act and *proof* of the same. The theory of defendant's counsel seems to be that there is no difference between the two, and that under the rule any testimony in favor of the commission of an overt act on the part of the deceased person is a proper and sufficient foundation for the introduction of such testimony, and that the trial judge is thus stripped of all discretion and of all power to consider the veracity or credibility of the witness making the statement. Such an interpretation of the rule is flagrantly erroneous. * * * *

"In passing on such a question, the trial judge must of necessity be clothed with the authority to decide whether a proper foundation has been laid for the proffered evidence, and that authority necessarily includes the discretion to ignore and not to consider testimony which his reason refuses to believe."

The ruling of the trial judge seems to have been based in strict conformity to the doctrine in this case.

Judgment affirmed.

No. 11,208.

MRS. JENNIE JOHNSON, WIFE OF WILLIAM JOHNSON, VS. E. A. CARRERE.

The principal's acts will be liberally construed in favor of a ratification.

A principal notified of the acts of his agent must disapprove them, within a reasonable time, or he will, by his silence, ratify them.

A judgment carried on a final tableau of distribution and partly paid in the final settlement of the succession, and duly homologated, after notification, binds the heirs, who will not be heard to plead its nullity on the ground of defective citation served upon their ancestor, the judgment debtor.

The authority of an agent can not be contested, more than twenty years having elapsed since the agency was alleged and the judgment obtained.

More than ten years have elapsed since the property was purchased by plaintiff's author in good faith, and a title acquired which was legal and sufficient to transfer the property.

APPEAL from the Civil District Court for the Parish of Orleans. *King, J.*

B. Armbruster, A. J. Murphy and *C. H. Osterberger* for Plaintiff and Appellee.

Branch K. Miller for Defendant and Appellant.

The opinion of the court was delivered by

BREAUX, J. The plaintiff sues to compel the defendant to accept title to a certain piece of property on Canal street.

The defendant agreed with plaintiff to purchase it from her for the sum of $6500.

The defendant, after an examination of the title, refused to accept it, on the ground that the judgment pronounced in the year 1866 in the suit of the Bank of New Orleans against C. Toledano, No. 21,799, of the late Third District Court, was null and void.

The said judgment was rendered for the sum of $51,477.68, upon confirmation of a default.

Under the execution of that judgment the property was acquired by Royal A. Porter, on 5th February, 1867.

Upon certain of the notes merged in the judgment, the endorsement of C. Toledano, the debtor, was by his agent, John Taylor. His authority to endorse as agent is not questioned, but his authority to represent the defendant in case No. 21,799 is denied.

The petition in that suit sets forth the authority of the agent to represent the defendant in the suit.

In the act of procuration the principal, Toledano, gives full power to his agent to manage and transact all his business: to draw checks and drafts; to make promissory notes, bills of exchange, drafts, bonds and all other obligations for the payment of money; to receive moneys and contract debts; to lease, sell and mortgage his property.

The power is general in terms, and the agent is especially authorized to ask, demand, sue for, recover and receive all sums of money due the principal, also to appear before all courts of law.

There is in the suit a citation to Toledano by service upon the said agent.

If it be conceded that the power was not so ample as it should have been there was absolute acquiescence in the sale.

The defendant, Toledano, departed this life three years after the judgment had been obtained, and nearly that time elapsed between the date of the sale of the property and that of his death.

He must have known that he had been sued through his agent, and that the property had been sold.

The agent's authority was never denied while the principal lived.

The maxim *Semper qui non prohibet aliquem se intervenire, mandare creditur* applies after these many years, during which the authority of the agent alleged judicially has remained unquestioned.

At this time the heirs do not dispute his authority.

After the death of the late C. Toledano, they ratified the proceedings in which the judgment was pronounced and the sale made.

The mortuary proceedings disclose that an inventory was duly made and an administrator appointed.

The administrator, in due time, presented a provisional account of his administration, from which we extract:

"The above balance of $24,450 has under the beforere cited order of the Second District Court been applied in part payment of the judgment obtained by the Bank of New Orleans against the deceased, in the Third District Court for this parish, in the suit numbered 21,799 in the docket of said court, for the sum of $51,477.63."

Some time after a tableau of distribution was filed.

The judgment for the same amount is carried on the tableau.

It was duly homologated.

Lastly, a final tableau of distribution was filed, also setting forth the indebtedness proven by the judgment now assailed and referring in term to that judgment.

Three of the heirs opposed the homologation.

Due advertisement was made and notice given of the filing.

This judgment was taken account of throughout in casting the debit side of the succession account.

It was partly paid with the proceeds distributed by the administrator, contradictorily with the heirs.

The ratification was entire and relates back to the suit in which judgment was pronounced.

More than twenty-six years have elapsed since the homologation and more than ten since Mrs. Porter, a third person to the original transaction, became the owner by purchase from the succession.

This period has cured all informalities, if any could remain, not cured after the heirs have expressly ratified the title by consenting to the distribution made and the partial satisfaction of the judgment.

The judgment appealed from in this case condemns the defendant to accept title.

No reference is specially made in the judgment to rents, which, in accordance to the agreement, is to be turned over to the vendees, nor to the taxes due on the property.

The deed tendered is not in evidence.

The defendant waived the tender.

In his pleadings he does not complain that the deed was not drawn in accordance with the terms and conditions of the agreement to purchase.

It will not be presumed that plaintiff has sought to evade any part of these terms and conditions.

We therefore will not amend the judgment as urged by defendant should be done. It covers all the rights of the parties.

The plaintiff and appellee prays for the infliction of damages for a frivolous appeal.

The defendant, in earnestly submitting his grounds of defence in matter of title to realty, has not rendered himself liable to damages.

Even if he had been over-prudent in matter of a title to immovable property, the lack of seriousness and earnestness must be obvious to justify the infliction of damages.

Judgment affirmed at appellant's costs.

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No. 11,228.

FRANCIS CARREAU VS. LOUIS A. CHAPOTEL AND MARIE LOUISE CARREAU, HIS WIFE.

Without alleging some mutuality or privity of obligation as mandatories, husband and wife can not be proceeded against as joint or solidary obligors on that account.

APPEAL from the Civil District Court for the Parish of Orleans. *King, J.*

B. R. Forman for Plaintiff and Appellant.

W. B. Sommerville and *Charles J. Theard* for Defendants and Appellees.

The opinion of the court was delivered by

WATKINS, J. In the lower court there was judgment maintaining the several exceptions of defendants', to-wit: Misjoinder of parties,

vagueness, indefiniteness, inconsistent and contrary demands, etc., and it also dismissed the suit as to Mrs. Chapotel, as of non-suit, and required the plaintiff to so amend his petition as to preserve only one cause of action, and further required him to elect whether his demand should be for a money judgment or for the possession of the property sued for, or in the alternative that his suit be dismissed.

It is from this judgment that the plaintiff prosecutes this appeal.

The following is a synoptical *résumé* of the plaintiff's petition, viz.:

That Mrs. Marie Louise Carreau, wife of Louis A. Chapotel, and Louis A. Chapotel, are indebted *in solido* to petitioner in the sum of $38,111.50, for this, to-wit:

"That petitioner and the said Mrs. Marie Louise Carreau, wife of Chapotel, are the only children and heirs of their mother, Mrs. Widow John Carreau. That said Marie Louise Carreau, wife of Louis A. Chapotel, with the knowledge and authority of her said husband, about the 19th of November, 1887, became the mandatory and agent of the mother of the petitioner, who was old and infirm, and unable to read and write, and was partially paralyzed, and who trusted her said daughter as her mandatory and agent.

"That, as said mandatary and agent, said Mrs. Chapotel collected notes from various persons named in the schedule annexed and made part hereof—

To the amount of	$24,975
And as such mandatory she received from petitioner's said mother in money	17,460
And in mortgage notes	5,000
And collected the rents of various houses from November 19, 1887, to September 10, 1890, at $850 per month, according to annexed schedule, say for two years and ten months	28,900
Total	$76,335

"Petitioner's mother died in this city on the 10th of September, 1890, without having received any account or settlement with her said mandatory and agent.

"That said Louis A. Chapotel was without means or resources, and on the 28th of February, 1888, he bought property from Mrs. Margaret E. Davis for $2500 cash, and the 18th of August, 1888, he bought another property from John Trisconi for $400, and he made extensive repairs and additions, all of which was done with the money of said Mrs. Widow John Carreau, in the hands of the wife of said Chapotel as agent."

(Here follows a description of the two pieces of property just referred to.)

"Wherefore, petitioner prays that Mrs. Marie Louise Carreau, wife of Louis A. Chapotel, and the said Louis A. Chapotel, be cited to appear and, after due proceedings, be condemned to render a full and perfect account of the agency aforesaid, and be condemned *in solido* to pay to your petitioner $38,111.50, with legal interest from judicial demand, and such other sum as may be found to be due, and that it be decreed that the property hereinabove described be decreed to belong one-half to petitioner, and petitioner prays for costs and for general relief.

(Signed) "FRANCIS CARREAU.

(Signed) "B. R. FORMAN, *Of Counsel.*"

SCHEDULE ATTACHED TO PETITION.

Memorandum of Cash.

1887. Money and notes collected, to-wit:

Peter Gonzales	$5000 00
Paul Rousset	2500 00
D. Hamel	300 00
Wm. Nicholaus	249 00
N. O. I. A. for Kenner property	1650 00
Cash in hands of P. E. Theard	2461 00
Rents collected for 10½ months of 1887	7665 00
	$19,825 00

NOTES HELD BY MY MOTHER AND NOT COLLECTED OR ACCOUNTED FOR.

Honorine Grima, two notes $400 each	$800 00
Michel Schenck, four mortgage notes, $587.50	2350 00
A. Marque due bill to ma	200 00
W. A. Bienvenue, mortgage $8000	800 00
Carrouche due bill	400 00
D. Hamel note mortgage	500 00
Jacob Baltz (promissory note)	100 00
	$5150 00

Upon a fair consideration of the foregoing petition and annexed tabular statement we are of opinion there is no joint obligation or solidarity of liability of the two defendants—who are husband and wife—alleged, and no privity of contract. For the charge of the petition is that Mrs. Marie Louise Carreau, wife of Chapotel, became mandatory and agent of the mother of petitioner, albeit with the knowledge and authority of her husband. That, as such agent and mandatory, she collected notes and rents, and received from her principal money and failed to render account thereof. That said husband was at the time without means, and shortly afterward made considerable purchases for cash.

Conceding this statement to be every whit true, and what privity of contract is there alleged? It does not alter or increase the obligation of the wife to her mother as principal, that her husband used a

part of the money she collected and for which she failed to account. It is not alleged that the husband came under any obligation as mandatory of plaintiff's mother, or that he ever incurred any obligation to her for the shortcomings of his wife, as such.

It is clear that upon the showing made, plaintiff can not call upon the husband, Chapotel, for an accounting. Evidently, plaintiff has set out no cause of action against him.

It is inconsistent to demand of the defendants an accounting as unfaithful agents, and at one and the same time call upon him for the restitution of personal or real property other than such as may have passed under their custody and control as agents.

Everything considered, we are satisfied that the plaintiff's demands should be readjusted and his petition reconstructed.

Judgment affirmed.

No. 11,265.

FLOWER & KING VS. S. S. PEARCE & SON.

CLIFTON CANNON, INTERVENOR.

The possessor of real estate under an *unrecorded lease* is thereunder invested with no right whatsoever as against a seizing attachment creditor.

T. H. Thorpe and *Wm. H. Peterman* for Plaintiffs and Appellants.

Joffrion & Joffrion, *J. C. Coppel* and *John C. & Chas. A. Wickliffe contra.*

The opinion of the court was delivered by

WATKINS, J. Originally, plaintiffs instituted an ordinary action against the defendants upon an ordinary commercial account, but subsequently supplemented it with an attachment, under which two plantations, properties of one of the defendants, situated in the parish of Rapides, with the growing crops of sugar cane, were seized; and also some other effects thereon, such as mules, etc.

There were three interventions filed by persons claiming the ownership of portions of the properties seized, but the only one with which

we are at present concerned is that of Clifton Cannon, who claims to be the owner of the crops as lessee of the plantations at date of seizure.

The claim of Cannon was sustained in the lower court and the plaintiffs have appealed.

Their defence to the intervention of Cannon is that he has no valid lease, and, if valid, it was not, at date of seizure under their writ of attachment, effective as to them because of the lease-contract not having been recorded as the law requires, so as to give notice to third persons.

We take it to be a well settled principle of our jurisprudence that an *unrecorded lease* of *real estate* has no effect as to third persons and seizing creditors.

This question was examined and decided by our immediate predecessors in Summers and Brannins vs. Clark, 30 An. 436, the court employing this language, viz.:

"As the lease was not recorded in the conveyance office, the question is not affected by the registry laws; but, as we have stated, the tenant, Boyd, holds under an *unrecorded lease*, and any payments of rents which he may have made by anticipation, to Clark, are without effect as against creditors, or subsequent purchasers of Clark.

"Nor are these principles more inequitable when applied to a *lessee* than when applied to a *purchaser* of immovables without registry, or movables without delivery. If a *vendee* in such a case can, by seizure, be deprived of possession and enjoyment under his purchase, why not a *lessee*? If, in such case, it is no defence that the vendee has paid the price, why is it that the lessee has paid the rent?"

In Anderson vs. Comeau, 33 An. 1119, this court reannounced that doctrine in even more emphatic language, thus:

"Articles 2264 and 2266 of the Revised Civil Code, providing substantially that all sales, contracts, judgments and acts affecting or concerning immovable property *not recorded according to law shall be utterly null and void*, except between the parties, and without any effect as to third persons, *apply to leases of real estate* as to other contracts. The possession of immovables *under such an unrecorded* lease * * * is vested thereunder with *no rights whatever, as against a seizing creditor.*"

In applying these principles to the facts of that case, the court said:

"It is sufficient to say that, *at the time of seizure, the property was unaffected by any recorded lease*, and *quoad* the seizing creditors stood, therefore, *precisely as if it had not been leased at all.*" (Our italics.)

These principles were again announced and affirmed, in Cochran vs. Herbert, 41 An. 735, the court again employing similar language, to-wit:

"While it is true that the plaintiff did not hold possession * * under a lease from her husband, the judgment debtor of Herbert, but from Boyer, as his vendee, *yet the effect of the non-registry of her lease* from Boyer is of like character. *We hold that such a contract unrecorded did not serve to put the creditors of Seiss upon notice of Boyer's possession and control of the property to which he had a conveyance.* Such a contract could not have the effect of forcing defendant to a direct action of nullity."

On the faith of those three deliberate opinions, we can with confidence declare that an unrecorded lease of real estate can not defeat the right of an attaching creditor, though his claim is unsecured by either privilege or mortgage; and, consequently, the intervening lessee of the attached debtor can not successfully interpose his claims, as against the seizure.

Intervenor's counsel, with exceptional ingenuity and assiduity, has collected quite a number of cases, on the authority of which they insist that our decision ought to be in his favor. We have examined them all, and find the following to be a correct analysis of them.

Sandell vs. Douglass, 27 An. 628, involved the ownership of cotton that had been grown on the premises, and afterward severed from the soil and packed in bales. The facts of that case were that after the seizure of the property under the mortgage, the sheriff did not divest or disturb the plaintiff's possession as lessee, and the creditor acquiesced in her rightful possession.

A like state of facts is presented in Richardson vs. Dinkgrave, 26 An. 632.

In neither case was there any question of registry of a lease involved.

Penn vs. Citizens Bank, 32 An. 196, involved no question of lease, the plaintiff claiming damages of the bank in reimbursement of loss

sustained in a copartnership adventure with the mortgagee, which had been occasioned by a premature seizure.

Lewis vs. Klotz, 39 An. 259, is a case of injunction to prevent a purchaser of an interest at sheriff's sale under a mortgage from taking possession of an entire plantation, the plaintiff's claim being that he was lessee, and entitled to possession of two-thirds interest.

Of this contention the court said:

"He had no more right to enter on the portion, or two-thirds interest of the plantation, under his purchase of the one-third, than a stranger would have had; and to this extent, and as relates to such portion—unaffected by his seizure and judicial sale, as stated—his attitude and conduct can not be viewed otherwise than that of a trespasser."

There was no question of the registry of a lease in that case.

In the case of Porchi vs. Baden, 28 An. 761, the lease was one under private signature and duly recorded.

The case of Bank vs. Ober, 44 An. 199, the facts were that the plaintiff claimed a proportionate share of *rents in money that had been collected of tenants* after date of seizure under a mortgage; the property having been cultivated by the *sheriff* subsequent to the seizure, who had leased the plantation to laborers and collected rents as the crops were harvested.

It was with reference to this state of facts that the court employed this language, viz.:

"When a seizure takes place during the pendency of a plantation lease for the entire year, payable in kind out of the crops when gathered, the seizure only covers the proportion of rents due for the unexpired term after its date."

In that case it seemed to be conceded that the lessee's right was destroyed by the seizure inasmuch as the sheriff was permitted to enter into peacable and undisturbed possession after making seizure, and lease the plantation to the laborers and collect the rent. And it also appears that there was no contest as to the lease antecedent to the seizure—there being no question about the registry of a lease.

The case of Thompson vs. Ratcliffe, 45 An., *ante*, p. 474, involved quite a similar state of facts.

All of those cases essentially differ from the instant case, and those quoted in its support.

In this case there was taken, in the month of July, a plantation with the growing crops thereon, immature and attached to and forming part of it—the crops being immovable by destination of law. And the lessee, holding under an *unrecorded lease*, resists the seizure on the ground that he is owner. In such case his right as owner, while perfectly good and valid as to the attached debtor, is unavailing as to third persons and seizing creditors, without registry in the manner required by law for conveyances of real estate.

Entertaining this view of the law the judgment appealed from must be reversed. It is therefore ordered and decreed that the judgment appealed from be annulled and reversed, and it is further ordered and decreed that the demands of Cannon, intervenor, be rejected at his cost in both courts. And it is further ordered and decreed that the plaintiff's and appellant's attachment of the property claimed by the intervenor be and the same is hereby sustained and their privilege as attaching creditors thereon recognized and enforced.

Rehearing refused.

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No. 11,266.

PHILIBERT LEMOINE ET AL. VS. C. J. DUCOTE ET AL.

A family meeting when convoked has the right to select others than those named in the order, when the latter do not attend, They can select those who are not relatives, when no relatives are present.

If the proceedings and deliberations refer to the petition which prayed for the order and which was based on the averments therein and the deliberations are responsive, although briefly stated, to the objects for which the meeting was convoked, a purchaser of minor's property. ordered sold by said meeting, which was homologated, will be protected. A purchaser of minor's property, ordered sold by the advice of a family meeting, is not required to inquire into the personal qualifications of the members of the meeting, He has only to look to the regularity of the proceedings and the order homologating the same.

The sale of minor's property without the advice of a family meeting and order of court is null and void, and the purchaser is in bad faith.

Section 3 of Act 43 of 1882 is not in conflict with Articles 92 and 122 of the Constitution, The duties imposed upon the clerk in said section of said act are ministerial and mandatory.

APPEAL from the Tenth District Court, Parish of Avoyelles. *Coco, J.*

G. H. Couvillon for Plaintiff and Appellee.

L. J. Ducote, *Thomas Overton* and *Clegg & Thorpe* for Defendants and Appellants.

Wm. H. Peterman for the Warrantors, Appellees.

The opinion of the court was delivered by

McENERY, J. This is a petitory action.

The plaintiffs sue for the recovery of two tracts of land in Avoyelles parish, which they allege were illegally sold by their tutrix.

The plaintiffs are the children of Cesaire Lemoine, and inherited the property from their deceased father. Their mother, Mrs. Leocadie Lemoine, qualified as tutrix of the plaintiffs. On the 30th January, 1884, she applied to the court for an order convoking a family meeting to authorize her to sell a "few acres of land" for the purpose of educating her children and improving their property. The order was granted by the clerk; the family meeting assembled and its deliberations conducted before him as *ex-officio* recorder, and the proceedings homologated by him as clerk, in pursuance of Act 43 of 1882, Section 3.

The members of the proposed meeting were not present, and others not relatives were substituted. The meeting advised the sale of three acres of the land of the minors, as follows: "After mature deliberation have unanimously decided that the said Widow Cesaire Lemoine be empowered to sell amicably to the highest bidder three acres of land of her said plantation, fronting on Bayou Rouge, for cash, or at terms as will be more convenient." The under tutor declared that he approved of the deliberations "as conducive to the best interests of the minors, and recommends their homologation."

The proceedings were regularly conducted. The family meeting had the undoubted right to select others instead of those who failed to appear. In default of relatives, friends may be selected. It is not shown in the record that there were relatives in the parish and present at the time who could have supplied the places of those absent. The reasons for the conclusions to which it arrived are not, as ought to have been, fully set forth; but we think they sufficiently indicate that they were directed exclusively to the object set out in the petition for the order for the meeting. However, the absence of these reasons can not affect a third person, who pur-

chased property sold by its advice, duly homologated by the court. The purchaser can not be required to go beyond the regular constitution of the meeting and the order homologating its deliberations.

Under the proceedings of this family meeting, homologated by the clerk, the tutrix, by public sale, adjudicated three acres of land to Serg. Callegari, on 13th November, 1884. He sold these three acres to the other defendant, C. J. Ducote.

These sales are attacked for nullity by plaintiff on the grounds that—

1. The family meeting convoked and held for the purpose of authorizing the sale of said property did not set forth the reasons of its deliberations.

2. It did not fix the terms and conditions of the sale.

3. The deliberations and recommendations were not homologated by the judge.

4. There was no order of court authorizing the sale of the property.

5. The property was not appraised and did not sell for its appraised value.

6. Act 43 of 1882, authorizing clerks of court to homologate family meetings, is null and void, as it violates Arts. 92 and 122 of the Constitution of the State.

We have disposed of the first ground, and the answer to the second is found in the deliberations of the meeting, wherein it is recommended that the property be sold for cash, or on terms of credit.

The third may be considered with the sixth ground, which will hereafter be discussed.

In answer to the fourth ground it is only necessary to say that after the deliberations of the meeting have been homologated this is a sufficient authority for the sale of the property—without obtaining a special order for the purpose.

The fifth ground has no foundation in fact. The property, of which the three acres formed a part, was inventoried at $1540, or about $19 per acre. The three acres sold for $400, a very large excess above the inventoried value. In the petition its value is alleged to be $500. We are of the opinion it sold for its actual value.

Act 43 of 1880, conferring certain powers on the clerks of District Courts, is very careful to mark the line between ministerial and judicial functions. In all cases in which oppositions can be filed, it directs that they shall, if filed, be docketed and referred to the judge.

Section 3 gives the clerk power to order family meetings, to convoke meeting of creditors of insolvent successions, of insolvent debtors, and to homologate their proceedings when not opposed. The order homologating the unopposed family meeting was purely a ministerial duty imposed upon the clerk by said act.

The family meeting is the tribunal to pass primarily upon the necessity for the sale of the minor's property. It is presumed that sufficient evidence for the necessity of the sale was presented to and acted upon by the family meeting which influenced their deliberations. Succession of Hawkins, 35 An. 593.

The duties of the clerk under said act are not only ministerial but mandatory. He has no discretion, because the act presumes that the family meeting has received and acted upon all the evidence adduced before it, and that its deliberations have been solely governed by it, and in the absence of an opposition there is no reason why approval should be withheld. In fact without an opposition there is no issue. There is nothing upon which the judgment can be exercised. There is no case presented for judicial action. The duty imposed upon the clerk to homologate the proceeding is only to carry into effect, to give authenticity to the proceedings of a body whose proceedings are to be recognized and to take effect, unless opposed. If opposed a *contestatio litis* exists, and a judicial proceeding is at once necessary. The order to sell minor's property is not a judgment. It affects no one. It is not a decree against any one, or against anything.

"A ministerial act may be defined to be one which a person performs in a given state of facts in a prescribed manner in obedience to the mandate of legal authority, without regard to or the exercise of his own judgment upon the propriety of the acts being done." Bouvier's Law Dict.

The Legislature, the legal authority, has vested in the clerks of District Courts the power to homologate the proceedings of a family meeting, when not opposed. The deliberations of a family meeting present to the clerk a given state of facts which he can not question. He can not exercise his judgment upon the propriety of the doing of the act recommended by the meeting. He must, if not opposed, take them as presented, and his duty is mandatory; and he must issue the order homologating the proceedings.

There is no provision, therefore, in Sec. 3 of Act 43 of 1882 which is contrary to or in conflict with Arts. 92 and 122 of the State Constitution.

The family meeting authorized the tutrix to sell only three acres of the minor's property.

On the 13th of December, 1886, Mrs. Lemoine sold to the defendant, C. J. Ducote, one acre and nineteen-hundredths of an acre of the minor's property. It was recited in the deed that "some time ago she was authorized by a family meeting held in behalf of her minor children, the issue of her marriage with her said deceased husband, Cesaire Lemoine, to sell ten acres of the tract of land upon which she now resides, situated on Bayou Rouge, in the town of Cottonport, and that she only sold three acres to Dr. Ducote, and that she wishes in virtue of the recommendation of said family meeting and by virtue of her own personal rights to sell one acre and nineteen-hundreths of an acre of her said tract of land, therefore she does hereby bargain, sell," etc.

The defendant, Dr. C. J. Ducote, claims that he is a purchaser in good faith. The facts contradict this statement. The deed to him of the first tract was based on the recommendations of the family meeting to sell only three acres.

He had actual knowledge, as the proceedings of the family meeting were referred to in the deed from the tutrix to Serg. Callegari. Callegari sold the land to Ducote, and Mrs. Lemoine intervened in the act of sale and approved the same. Callegari did not comply with the terms of the adjudication, and the defendant, Ducote, by consent took the property off his hands. Hence the intervention of Mrs. Lemoine. This is practically the result of the adjudication, although it appears that Mrs. Lemoine wanted cash, which Callegari was unwilling to give, and Ducote relieved him from the adjudication by furnishing it.

But whether he had actual or constructive knowledge that the family meeting had not recommended the sale of ten acres, he at least knew that minor's property can not be alienated without an order of court based on the recommendations of a family meeting. In dealing with the tutrix he was bound to inquire whether she had the authority to sell. Her statements that a family meeting had advised the sale will not protect him.

At the moment he took title from the tutrix, without authority to sell, he knew the defect of his title and was a purchaser in bad faith. C. C., Art. 339; 8 M. 629; Walling Heirs vs. Mosefield, 33 An. 1174.

He therefore owes the fruits and revenues of the property from the date of the sale, during the time of full possession. 33 An. 1174.

Mrs. Lemoine is called in warranty by the defendant Ducote as tutrix and individually. No judgment could be rendered in warranty against her as tutrix, as it would in effect be giving judgment against the plaintiffs. The defendant is entitled to a judgment against her individually for the price of the property. No damages have been alleged or proved.

The lot was vacant and unimproved when the defendant purchased it. He has put upon it a house and some fencing. The property is worth for rent $5 per annum unimproved.

The judgment appealed from was partly in favor of defendants and plaintiff, decreeing the nullity of the sale of both tracts, and sustaining a part of defendant's reconventional demand, and dismissing the call in warranty, but reserving defendant's right to proceed against Mrs. Lemoine.

We find it convenient to reverse the judgment in order to recast it, and we think it but just, as it will in effect sustain a part and reverse other parts of it, that plaintiff and defendants should equally bear the cost of appeal.

It is therefore ordered, adjudged and decreed that the judgment appealed from be annulled and reversed, and it is now ordered, adjudged and decreed that the defendant Ducote's title to the three acres of land described in the deed to him from Callegari to him be recognized, and that he be declared the owner of the same and be maintained in possession thereof. It is further ordered and decreed that the sale of the 1.19 acres of land made by Mrs. Lemoine, tutrix, to the said Ducote, dated 13th December, 1886, be declared null and void and of no effect, and that the plaintiffs be decreed to be the true and lawful owners of the property described in said deed and be placed in possession of the same.

And it is further ordered that said Ducote be permitted, without damage to said property, to take away the improvements placed thereon by him, within sixty days from the finality of this judgment, during which time the plaintiffs shall have the right to elect whether they will accept said improvements by paying their value or shall require their removal.

And it is further ordered and decreed that the plaintiffs have and recover judgment against the said Ducote for the sum of $5.19 from 13th day of December, 1886, per annum, until the restoration of said property to plaintiffs.

It is further ordered that the said Ducote, the vendee of Mrs. Cesaire Lemoine, do have and recover judgment against her for the price paid for said property on 13th December, 1886, with 5 per cent. interest per annum from judicial demand. Plaintiffs and defendants to pay costs equally of appeal.

Rehearing refused.

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No. 11,167.

H. J. WARNER vs. J. G. CLARK & CO.

1. Under the law of Louisiana libel is a *quasi* offence, actionable under the broad provision of the code, "Every act whatever of man that causes damage to another obliges him by whose fault it happens to repair it." Spotorno vs. Fourichon, 40 An. 424.
2. Our courts are not bound by the technical distinctions of the common law as to words actionable *per se* and not actionable *per se*. Miller vs. Holstein, 16 La. 389; Feraz vs Foote, 12 An. 894; Spotorno vs. Fourichon, 40 An. 424.
3. The extent of damage to credit is an inferential fact arrived at only by an examination of all the circumstances in a case and can not be the subject of direct proof. Damages or injury may be inferred from the nature of the words written and from the circumstances under which they were written without the necessity of special proof. Miller vs. Holstein, 16 La. 389; Daley vs. Van Benthuysen, 3 An. 69; Tresca vs. Maddock, 11 An. 206; Cass vs. N. O. Times, 27 An. 214; Spotorno vs. Fourichon, 40 An. 424.
4. The rule that parties raising objections in the lower court must, at the trial, state their particular grounds of objection—the materiality of the action complained of and the reasons of the judge for his rulings, has not been superseded by the statute authorizing objections to be noted in lieu of a bill of exceptions. Parties must still disclose everything necessary to enable the appellate court to say that the court below erred.
5. A plaintiff may, for the purpose of proving the allegation of his petition that he has suffered special and general damage as the result of certain letters written and sent out by the defendants, question the parties who received the letters or heard their contents discussed, as to the effect produced upon them by the letters, such evidence not being offered to prove the meaning of the words used nor the innuendo charged, but the substantive fact of damage sustained.

APPEAL from the Civil District Court for the Parish of Orleans.
Ellis, J.

B. B. Howard and *Merrick & Merrick* for Plaintiff and Appellee.

Gurley & Mellen for Defendant and Appellant.

The opinion of the court was delivered by

NICHOLLS, C. J. Plaintiff's petition is to the effect that his occupation is that of a clerk and solicitor, in which he has been engaged for years and entirely dependent thereon for his living, and that in the said pursuit he always had the esteem and good will of his fellow-citizens. That petitioner was in the employ of defendants and served them honestly and faithfully as a solicitor, and that about the 16th September, 1891, he was discharged by them, giving as the reason for the discharge that he was not as successful in soliciting business as they had anticipated, and for this reason only they would require his services no longer. That subsequently he was employed as a clerk in the office of the Cromwell Line Steamship Company and remained in its employ for some time in New Orleans and again returned to the business of soliciting for the house of Richard M. Ong, dealer in paints, oils, etc., and doing identically the same business and dealing in the same merchandise as defendants. That petitioner was doing a successful business for the said R. M. Ong. That the house of R. M. Ong was in opposition to James G. Clark & Co., the defendants. That petitioner suddenly ceased securing orders and that his customers refused to patronize him and refused to have any business relations with him whatever, and he was notified by them and verily believes and charges as the reason of said refusal (and for no other reason than that), that his said customers did receive from James G. Clark & Co. a circular letter prepared and published by said James G. Clark & Co. in the following language, to-wit:

JAMES G. CLARK & CO.,

Warehouses 203, 205, 207 Magazine street, 17, 19, 21, Natchez street.

Storage Yard, Erato near Magazine street.

Oils, Sugar House Supplies, Naval Stores, Building Materials,

Painters' Supplies.

Office 62 Magazine street,

City. NEW ORLEANS, October 17, 1891.

GENTLEMEN—Mr. Harry J. Warner, formerly in our employ, is no longer so.

Our friends and customers will kindly note the above and give Mr. Warner no recognition on our account.

Thankful for all past favors we ask at your hands a further continuance of same.

We remain yours very truly,

(Signed) JAMES G. CLARK & CO.

J. G. C.

By the above letter meaning to imply and imp ying and meaning to insinuate and insinuating that petitioner was dishonest and unreliable and otherwise casting reflection on the integrity of petitioner and intending to injure petitioner in his good name, fame and credit, and to bring him into public scandal and contempt.

Petitioner further averred that James G. Clark or some member of the said firm maliciously and falsely and without cause libeled and slandered petitioner in said letter, and its meaning therein conveyed, and he specially charged that said letter was written and delivered to petitioner's customers and to no other persons except those whose business was solicited for orders in the line of goods which petitioner's house, R. M. Ong, and also James G. Clark & Co., dealt in.

That it was written maliciously and without any probable cause for the express purpose of injuring petitioner in the estimation of his customers, and to completely ruin and destroy the confidence of the public in petitioner, which purpose has been accomplished by said letter and false and malicious accusations and insinuations.

Petitioner further represented that his character has always been of the best and his integrity unquestioned; that he has always conducted himself in an honest and straightforward manner in all business transactions, and has always earned a living in the community and city where he has lived, and that now he is unable to get employment at his business or any other business of responsibility on account of said malicious libel and misrepresentation by said James G. Clark & Co. That he has been grievously injured in character and reputation and financial and business relations to the amount of $10,000.

All of which acts of said James G. Clark & Co. were done with malice aforethought and malicious intent to injure petitioner and to secure for themselves any trade which petitioner might divert as

solicitor for the house of Richard M. Ong. Petitioner prayed for judgment for damages against defendants for $10,000 and for trial by jury.

Defendants filed (1) an exception that "the petition disclosed no cause of action against defendants or either of them. That the letter complained of does not libel or slander petitioner," and (2) an exception that "said petition was too vague and indefinite to enable them to safely answer thereto."

"It does not set forth what customers or who refused to patronize petitioner and refused to have any business relations with him, nor when or at what dates, nor does it show or set forth of what items his claim for $10,000 is composed, or what, if any, actual loss he has sustained, and they prayed that the petition be dismissed."

The court overruled the first exception but partially sustained the second, "requiring plaintiff to amend and state the names of the customers of plaintiff who refused to patronize plaintiff or to have business relations with him, and where and at what dates, on account of said letter."

Plaintiff under this ruling filed a supplemental petition in which he averred that he had immediately after the publication of said libel had a great falling off in his business, and had reason to believe and alleged that said falling off was due to said malicious and libelous publication of defendants as set out in the original petition.

That he can not say with exactness which of his customers refused him business on account of said libel, but he appended and made part of his amended petition a list of such of his customers who formerly dealt with him and who have ceased to give him orders of any magnitude since its publication, and who with others (whom petitioner does not now remember), as petitioner believes and charges, have been influenced by the said malicious and wrongful act of defendants. That by reason of said libel he has been unable to get a salary of $75 a month, promised him by Richard M. Ong, provided he should do a successful business, besides losing large receipts for commissions. That petitioner estimates his financial damages at $1000, and the damages to his injured feelings and his character and reputation $9000.

To this petition was appended a list containing the names of a number of business firms.

Defendants pleaded the general issue. They admitted that their firm wrote and sent to some of their customers the letter referred to in plaintiff's petition, but averred that said letter did not contain and was not intended as a libel or slander upon plaintiff. That all the statements made in said letter are true and that they were justified in writing and issuing the same. That after his discharge by defendants, and before the writing and issuance of said letter, said Warner frequently called at defendants' place of business, and saying that he was expecting letters containing orders for defendants which he wished to turn over to them; he was admitted into their private office; and there obtained information as to their business. That no letters containing orders for defendants ever came to their office for said Warner, or if they did, he did not turn the orders over to them. Defendants subsequently learned that at the time of his visit to their private office said Warner was soliciting business for Richard M. Ong of this city, a rival of theirs, and thereupon they charged him with being in said Ong's employ, which he at first denied but (upon being pressed), admitted to be true. That after having obtained information as to defendants' business, by access to their private office, said Warner called upon customers of defendants whom they were about to supply with goods, or with whom they were negotiating for the sale of goods, and endeavored to prevent the sale of defendants' goods, and to effect a sale of said Ong's goods, to said customers.

That they would not have permitted said Warner to enter their private office and obtain information as to their business if they had known that he was soliciting business for said Ong.

That while in their employ said Warner attempted to borrow a sum of money from Mr. Robert Beltrain upon his statement to him that he, said Warner, had on deposit with defendants, or that defendants owed him, the sum of $90; that at that time said Warner had no sum on deposit with defendants, nor did they owe him any sum whatever; that they issued said circular letter because they believed it necessary for their protection by reason of the above mentioned facts and other acts of said Warner, and they were actuated by no other motive or purpose.

On the trial of the case the jury rendered a unanimous verdict in favor of plaintiff for the sum of $3000.

Defendants moved for a new trial on the grounds that:

1. The court erred in permitting plaintiff to offer before the jury testimony tending to show that the letter written by defendants was discussed by other persons than those to whom defendants sent it, and upon information not derived from defendants.

2. Because the court erred in permitting plaintiff to offer evidence before the jury tending to show merely the impressions or conclusions of third persons, and to prove the innuendoes charged by plaintiff, when the letter complained of is in plain, unambiguous terms.

3. Because the jury disregarded the law requiring express malice to be proved in cases of privileged communications, such as the letter complained of in this case, and no malice having been proved, defendants were and are entitled to have plaintiff's suit dismissed.

4. Because the jury was prejudiced against defendants by efforts made by plaintiff's attorneys to introduce matters which were held by the court to be entirely irrelevant and improper.

5. Because the jury was prejudiced against defendants by an improper inspection during the trial of documents constituting only a portion of the evidence in the case.

6. Because no actual damage was proved and no evidence offered by him upon which it is possible to estimate any damage, as is attempted to be done by the verdict.

7. Because the verdict is contrary to the law and the evidence.

The court overruled this motion and rendered judgment in favor of plaintiff against defendants for $3000 in conformity with the verdict of the jury. The defendants have appealed.

The first contention of the defendants in this court is that there was error to their prejudice in not maintaining their exception of no cause of action. They say "there is nothing of a libelous nature in the letter, nothing from which it could be reasonably inferred that Mr. Warner had been discharged for dishonesty as charged in the innuendo—that the language used was not capable of such meaning." In support of their position they quote Mulligan vs. Cole et al., L. R. 10, Q. B. 549; Newell on Defamation, pp. 287–8, Sec. 25; Dunsee vs. Norden, 36 An. 79.

Article 2315 of our Civil Code declares that "every act whatever of man that causes damage to another obliges him by whose fault it happened to repair it."

In Spotorno vs. Fourichon, 40 An. 424, we said: "Our courts are not bound by the technical distinctions of the common law as to words actionable *per se* and not actionable *per se* and allowing for the latter only actual pecuniary damage specially proved. Miller vs. Holstein, 16 La. 389; Feraz vs. Foote, 12 An. 894.

"If the charges are false, injurious, and made maliciously or *malo animo*, they combine all the elements essential to support the action." These remarks apply fully to the case at bar. Plaintiff's allegations cover each of these essential requirements, and if proved would certainly entitle him to a judgment for damages for some amount. The case of Dunsee vs. Norden referred to was not decided on an exception of no cause of action, but after a trial on the merits and evidence heard.

We think the ruling of the court on the exception was correct.

Defendants, denying that the language of the letter was "capable of the meaning charged in the innuendo," complain that the court permitted witnesses to testify as to the impression made upon them by reading the letter—to their understanding of its meaning and to their proving it had the meaning plaintiff attributed to it. When plaintiff's counsel asked of the first witness whom he placed on the stand and examined "what impression the letter conveyed to his mind," we find a statement made in the note of evidence that "defendants' counsel objected," but neither the grounds of objection, the ruling of the court nor its reasons are stated—nor is there any mention of an exception having been taken or any bill reserved. The action of the court seems to have been first specially objected to on an application for a new trial. We take occasion to say that the law authorizing a note of objections to be substituted in lieu of a bill, never contemplated doing away with the recitals which we have always held necessary to a proper bill of exceptions, and further to say that it is essential that the court should be fully advised of everything requisite to enable it to act advisedly upon all proceedings and rulings in the lower court.

In the reasons assigned by the district judge for overruling the motion for a new trial he thus alludes to defendants' objections on this particular point:

"The second ground of defendants' motion is that witnesses were permitted to tell their impressions produced by the letter and to prove the innuendo charged.

"In no instance was any witness permitted to explain the meaning of the letter or to prove the innuendo alleged by plaintiff, so far as I can find. Testimony WAS received to show injury to plaintiff's name and reputation by reason of or as the result of the letter, and the comments it set in motion, and thereby to prove actual damage as alleged and general damage as alleged. The assumption of facts having this ground is not well founded. Every ruling that I made was based on the view that having alleged actual and general damages plaintiff should be permitted to prove that the effect of the letter on the minds of those who saw or heard of it was to injure his character and to excite suspicions of wrong-doing. How else could he prove this than by hearing what EFFECT or result the letter produced on the minds of third persons I can not conceive. Such evidence was not offered to explain the letter or to prove the innuendo."

The reasons assigned by the judge fully justify, we think, his ruling on this particular point.

Later on in the trial, another witness being on the stand, he was asked by plaintiff, "What was the impression received by you from what you HEARD?"

To this question defendant objected "BECAUSE the letter complained of, *being a privileged communication* and not having been circulated or published by the defendants, they are not responsible for the publication or circulation made by others not authorized or intended by themselves." Following this entry on the note of evidence we find the words, "Objection overruled, bill reserved." We find no bill in the transcript. Before considering the objection we wish to direct the attention of the district judges to the necessity of their supervising the objections as stated in the note of evidence and to the reasons for their rulings being simultaneously noted, so as to bring matters to the situation they would have been had the statute we have referred to not been passed—modified, of course, to the extent of doing away with mere formal and non-essential particulars.

We come to a knowledge of the reasons for the judge's action by the statement already given as to his rulings on objections to testimony. That statement covers the complaint we are now considering, as well as that we have just mentioned. We think the judge decided correctly; plaintiff, having proved that his name and reputation were being injuriously criticised, had the right to trace this fact, as a fact, to its cause; and, if he could, to the circular letter. Hav-

ing alleged that by and through the act and fault of the defendants in writing and delivering this letter he had suffered general and special injury, he was entitled to prove that allegation as a fact independently of the particular persons who, having received the letter, may have spoken of the same and its contents and thereby increased the circulation of the statements therein. The question is, did the act of the defendants in writing and sending out this circular h ve, as its general effect, to injure the plaintiff. The testimony objected to legally tended to prove that fact in our opinion, and was admissible. It may be well to say in this connection that we do not regard the circular letter sent out by the defendants as a privileged communication.

The evidence shows that the plaintiff, who had been several months in defendants' employ, was discharged by them on the 30th September, 1891, and that the separation took place without friction.

Amicable and cordial relations continued to exist between the parties, so much so that the plaintiff (who on leaving the defendants had gone into the employ of the Cromwell Line of steamers), was in the habit of stopping at the defendants' store and with defendants' consent making himself, it would seem, very much at home. Suddenly he was informed by the junior partner that his presence was offensive to them and that they did not wish him to return. This notification was followed up by the writing and sending out of the circular letter which has given rise to this litigation. We are relieved from any great trouble in ascertaining the cause and motive of this act by the testimony of the two partners given on the trial. This testimony causes us to eliminate in that connection from the case that portion of the answer which refers to certain small purchases made by the plaintiff at another store and his attempted loan of money from a friend of his. We are satisfied the first matter was known at the time and not considered at all reprehensible, and that knowledge of the second did not reach them until after they had taken the step they did and had no bearing on the case.

In Alba vs. Moriarty, 36 An. 681, a case where the plaintiff was suing his employer for his salary for having prematurely discharged him without cause, the court in speaking of the discharge said: "It is also shown by Moriarty's own testimony that at the time he dismissed the plaintiff he had not been informed about the alleged

irregularities charged in the answer, and, therefore, they could not have entered into the reasons for his discharge—they were really an afterthought and an evident pretext."

These words are applicable to the case at bar.

The real ground upon which the defendants acted, and on the sufficiency and correctness of which this case will have to turn as justifying their course, was that they had reached the conclusion that the plaintiff (as the senior partner said), "had been dealing falsely with them—not doing the square thing; that Mr. Warner was going to their office regularly, and at the same time he was going there he was in the service of R. M. Ong & Co." (a retail house)—"that is, a portion of the time"—and because (as the junior partner said) "they were very indignant because they thought he (plaintiff) was playing the dirtiest and shabbiest trick a man could play—representing another firm and still going to their office."

We must inquire whether the plaintiff was in point of fact guilty of any double dealing with the defendants, and if he was so guilty, whether defendants were justified in resorting to the action they did as a corrective.

We may say at once that there is no evidence that the plaintiff either obtained any advantages by his visits to the defendants' store, or if he did that he ever utilized them—there is not a scintilla of testimony going to show that he ever represented to any one after his discharge from defendants' service that he was still continuing therein, or that in soliciting for orders he concealed the fact that he was doing so for the house of Ong & Co. It would have been an act of folly for him to have attempted to do so, for the deception or misrepresentation would have inevitably been discovered at once. If the plaintiff was guilty of any wrong it would have been at worst of continuing to visit in a friendly, intimate manner at defendants' store, when at the time of doing so he was in the employ of a rival establishment.

When the defendants (as they had a right to do) discharged the plaintiff their business relations were completely severed and the latter was at liberty to seek employment elsewhere, and obtain it wherever he could. The fact of his prior service with the defendants in no manner interfered with his seeking service with a rival establishment, and if employed by a rival house he was fully authorized in doing his utmost for it (as unquestionably it was his duty to have

done prior to discharge for the defendants), even though in doing so he might work to the prejudice of his former employers—provided, of course, in so doing he was guilty of no misrepresentations or legal wrong-doing. We know of nothing which would cut the plaintiff off from his absolute right of soliciting any one he might choose to solicit for orders, among others the customers of the house with which he had been connected and with whom he may have become acquainted through such connection.

We know of no reason why friendly relations should cease to exist between a commercial firm and one of its former employés, *ipso facto* by his going into the service of another house in the same branch of business. We see no good reason why Mr. Ong, himself, the head of the other house, could not with full propriety have visited defendants precisely on the same footing that plaintiff did. If the action of either the one or the other in doing so were to meet with the disapproval of the defendants it would be a pure matter of feeling and taste and not of right or wrong. As a matter of fact, however, it is exceedingly questionable whether the plaintiff, after he became employed by Ong & Co., ever went to defendants' store more than on one occasion. Whether he would have done so or not had not the defendants objected, is pure speculation. Plaintiff's visits to defendants' store seem to have been when he was employed with the Cromwell Line of steamers. Assuming, however, that plaintiff was employed by Ong & Co. when so visiting the defendants' store, and was at that time soliciting for Ong & Co., and defendants should have thought such conduct reprehensible and inconsistent with their ideas of propriety and fair or square dealing, their plain, obvious remedy was the very one which they at first adopted of requesting a discontinuance of such visits—a remedy which proved fully efficacious. We think the defendants were entirely unjustifiable in following up this action of theirs by sending out the circular letter which they did. There was no legal relation or connection between the conduct complained of and this letter which defendants circulated. Plaintiff had not sought to utilize in any improper way his connection with them, and there was no reason when they distributed the letter, for them to apprehend that he would do so. The defendants were, as they say, "indignant," and the letter was obviously sent in anger and intended as a punishment and to injure plaintiff, and not as a protection either to their customers or to themselves. They say themselves that as a

solicitor he was a failure; they assign this as a reason for discharging him, and if this was true they had no reason to fear that he would (even had he resorted to illegitimate means—which he did not—) have diverted any large amount of trade from them. We see no ground for any claim that this circular letter was a privileged communication. Written and sent to every one whose name happened to be on the address book in their store, they were bound to suppose that the parties to whom it was addressed, or, at all events, a large part of them, would not consider it in that light and would naturally speak of its contents to others and those contents would be publicly discussed.

The whole matter was referred to a jury, they heard the evidence and saw the witnesses, and after full hearing they have found by returning a verdict in favor of the plaintiff that the allegations of his petition are true and his prayer just and well founded. The district judge on application for a new trial gave his views on the questions here raised, and (save as to the amount of the damages found) he concurs in opinion with the conclusions reached by the jury. On this last point, though refusing to set aside the verdict, he obviously was of opinion that it was for too large an amount.

In the case of Spotorno vs. Fourichon, already mentioned, this court said: "Both the damage or injury and the malice may be inferred from the nature and falsity of the words and from the circumstances under which they were uttered, without the necessity of special proof."

In the case at bar we are perfectly satisfied that the plaintiff has been injured and damaged, but it certainly can not be said that he has proved the amount with certainty. Plaintiff had been pretty generally employed for the last eleven or twelve years at a salary or on commissions which brought him from $30 to $75 a month; he was in defendants' employ at $60 a month, but before this difficulty arose they had reached the conclusion that his services in their line as solicitor was not worth that much. He was paid $75 a month by the Cromwell Line, but after a week's employment he voluntarily left them to take service with R. M. Ong & Co., who were to pay him at the rate of $60 a month should he establish to their satisfaction after a trial (at first on commissions), that he would make a successful solicitor. This he was unable to do for the assigned reason

that defendants' circular letter had caused him to be thrown under a cloud which forced him to leave his home and seek service at St. Louis, at which place at the time his testimony was taken in the lower court (June 15, 1892) he was about obtaining employment. From the date of the letter he does not appear to have been employed elsewhere than at Ong's as a solicitor, where his commissions for seven months were almost nominal—$75 or $100.

In the very nature of things it would be impossible for a solicitor to establish to what precise extent a failure to obtain orders would be attributable to the circulation of a letter of a character injurious to him. That kind of business is to a very great degree dependent upon the favor of the solictor in the community in which he lives and his good name and credit, and these are not readily measured; indeed, it has been frequently decided that extent of damage to credit is an inferential fact which can be arrived at only by an examination—a weighing of all the facts and circumstances—and can not be the subject of direct proof. Trammel vs. Ramage, 93 Ala.

For the reasons herein assigned it is hereby ordered, adjudged and decreed that the judgment of the lower court be and the same is hereby amended so as to reduce the judgment of the plaintiff against the defendants from $3000 to $600, and as so amended the said judgment is hereby affirmed, costs of appeal to be paid by the plaintiff and appellee, those of the lower court by the defendant and appellant.

No. 11,236.

ELIZABETH SCHNEIDER ET AL. VS. JAMES BURNS.

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1. The recording in the office of the recorder of the certificate of the clerk of the court of the amount of the minor's property, according to the inventory on file in his office, operates as a legal mortgage in favor of the minor for the amount therein stated on all the immovable property of the tutor as a security for his administration, from the day of his appointment until the liquidation and settlement of his final account.
2. This mortgage is not only to cover administration of the particular money or property included in the inventory, but covers the eventual balance which will be due by the tutor at the close of the tutorship. All the property owned by the tutor during the tutorship is struck by this mortgage, whether acquired by him before or after the receipt of particular funds, and whether it had been sold prior to such receipt, unless said property had been withdrawn from the operation of the general mortgage by restricting the latter upon specific property, under the statutes specially providing for and governing such cases.

3. The inscription of the clerk's certificate having been once made can not be erased from the records until the close of the tutorship, although its effect may be restricted to particular property under conditions specially affixed by law.
4. Accounts of tutorship presented during minority and homologated contradictorily with the under-tutor are not final judgments fixing absolutely the relations between tutor and pupil up to a certain date—they are provisional in character, merely *prima facie* correct, and subject to revision and correction up to the final account of tutorship. When revised, and corrected, the amount actually due is supported by the mortgage resulting from the inscription originally made.

There is no law authorizing the absolute release of the tutor's personal responsibility or of the tutor's property from the legal mortgage securing that responsibility until the termination of his functions.

APPEAL from the Civil District Court for the Parish of Orleans. *King, J.*

James Timony for Plaintiff and Appellee.

H. C. Cage for Defendant and Appellant:

1. The minor's legal mortgage on the property of his tutor arises under the ancient law of Louisiana, contained in Art. 3282 of the Code of 1825, now Art. 3314 of the Code of 1870. Skipwith vs. Glathary, 34 An. 28.
2. The provisions of law contained in Act 95 of 1869 and Arts. 321 and 322, C. C. of 1870, simply restrict the legal mortgage to the sum named in the clerk's certificate, and provide for its registry so as to affect third parties, in view of Art. 128, Const. 1868, and Art. 175, Const. 1879.
3. During the minority of the pupil, the legal mortgage can only be canceled by a special mortgage on particular property by the advice of a family meeting. 33 An. 49; 19 An. 55; 12 An. 78; 12 An. 361; 5 An. 497.

The opinion of the court was delivered by

NICHOLLS, C. J. Plaintiffs allege that at a public sale made by Baumgarden & Fredericks, auctioneers, on the 25th of January, 1893, certain property described in their petition was adjudicated to James Burns for the price of $2200; that they are the owners of said property and that they tender a good unencumbered title to said adjudicatee, but that he refuses to accept the same and to comply with the adjudication. They pray that he be cited and that they have judgment ordering him to comply with the adjudication and pay the price thereof, and on his refusal to do so within ten days from judgment that they have execution against him for $2500, with interest from January 25, 1893, and costs.

Defendant pleaded first the general issue—further answering he said "that the property described was duly exposed at public auction and was adjudicated to him at the price and sum of $2200 as the last and highest bidder. That a title was offered him to said property, but he specially denied that the same was clear and unencumbered for the reason that Mrs. Elizabeth Schneider, one of the vendors, was married to one Andrew Schneider, who died on the 8th day of November, 1890, leaving separate and community property in the parish of Orleans, and leaving a minor child, Antonia Schneider, aged about eleven months, being the issue of the marriage between him and said Elizabeth Schneider. That the succession of said Schneider was opened in the Civil District Court for the parish of Orleans; that an inventory was taken which showed the said minor's interest to amount to the sum of $1440. That a certificate of said inventory was filed in the mortgage office of the parish of Orleans upon the application of Mrs. Schneider to be confirmed and qualified as natural tutrix of said minor, and said inscription became a general mortgage upon all the property of said Mrs. Schneider, and especially upon the piece referred to, for the amount shown by said certificate, there to remain and act as such until the final settlement between Mrs. Schneider and her said pupil."

"That Mrs. Schneider has illegally and wrongfully caused said minor's mortgage to be nominally canceled and erased from the books of the recorder of mortgages, and notwithstanding said illegal and wrongful cancellation said minor's mortgage remains in full force and effect, and the property tendered to respondent is liable under said mortgage to secure and make good to said minor whatever sum or sums which may be due to said minor upon final settlement with her tutrix. He therefore prayed that the demand of plaintiffs be rejected."

The case was tried upon an agreed statement of facts, which was as follows:

1. Mrs. Elizabeth Schneider filed an attested account which is signed by the under-tutor and which was duly homologated by the udgment of the court. This account shows that the tutrix owed the minor nothing, the succession of Andrew J. Schneider being insolvent.

2. Mrs. Elizabeth Schneider took a rule upon the under-tutor and the recorder of mortgages, alleging the fact as herein stated in No.

1 of this "statement of facts" to show cause why the inscription in the mortgage office resulting from the filing of the clerk's certificate of the amount of the inventory should not be canceled, and the rule was made absolute and the inscription canceled.

3. The paternal grandmother of the minor is aged, and when she dies there will probably devolve upon the minor an inheritance amounting to about $1000.

The District Court rendered judgment in favor of plaintiffs against defendant as prayed for by them and defendant has appealed.

The proposition contended for by the plaintiffs is that if at any period between the appointment of a tutor and his discharge at the termination of his trust, he should file an account which after due proceedings would be homologated contradictorily with the under-tutor, by which it would appear that at the date of filing and homologation there was nothing due by the tutor to his pupil, and nothing for which he was then responsible, the tutor would be authorized to obtain a subsequent decree (on proceedings also taken contradictorily with the under-tutor) for the erasure from the mortgage records of the inscriptions which up to that time evidenced a mortgage in favor of his ward, and a judgment declaring the non-existence of any mortgage on his property. That a decree to that effect would enable the tutor to sell his property, and a purchaser from him to acquire his property free from the minor's mortgage.

The proposition is not sustainable in law. It rests upon false premises and false assumptions.

In the first place the account which is rendered by a tutor pending the tutorship, and which may be homologated contradictorily with the under-tutor, is not a final judgment and does not definitively fix the situation or condition of affairs even up to the date at which it is rendered. It is at best only *prima facie* correct, and is subject to be reopened by the minor when he becomes of age and is subject to amendment or correction to the full extent of error.

In Stafford vs. Villain, 10 La. 329, this court said: "Tutors under an order of the Court of Probates must, and without it may, exhibit an account of their administration and the court may make certain orders thereon, but nothing authorizes it to homologate such accounts so as to render them conclusive and binding on the minor, for the law gives to the latter the right until the expiration of a certain delay after he becomes of age to examine and contest all the ac-

counts of his tutor. The court, therefore, can in no case relieve and discharge the tutor from his responsibility."

The first error in plaintiff's position is in ascribing to a provisional account homologated during the tutorship the effect of determining absolutely the relative position of tutor and ward at any given fixed period.

The next error is in assuming that the inscription of the certificate of the district clerk, furnished by him in compliance with Art. 3351 of the Civil Code, showing the amount of the minor's property according to the inventory on file in his office, operates a mortgage in favor of the minor for the amount therein stated, to secure the faithful administration of the tutor for the property therein stated, and that upon showing that that particular property or money has been legally expended or accounted for, the mortgage (being a secondary or accessory obligation for that particular sum or property), falls and disappears, leaving the future rights of the minor to be secured by a new inscription as to their existence and as they arise, to be made by the tutor or under-tutor.

It has been repeatedly held by this court that the legal mortgage of the minor was not for the accounting of any particular sum of money or property, but for his faithful administration during the whole period of the tutorship. Speaking of this general mortgage, the court, in Barnard vs. Erwin, 2 Rob. 407, said: "A general mortgage, says the Code, is that which binds all the property present and future. A special mortgage is that which binds only certain specified property. A mortgage may be stipulated for the fulfilment of any obligation whatever, even for the completion of an act. It may be given for an obligation which has not yet risen into existence, as where a man grants a mortgage by way of security for endorsements which another promises to make for him. It was clearly the intention of the Legislature to secure to the minor the faithful administration of the tutor up to the moment of his final discharge, and therefore the amount secured by the mortgage is not necessarily to be ascertained at the moment the mortgage was executed. If other sums should come into the hands of the tutor the property mortgaged would stand as security. The amount found due by a settlement in the Court of Probates during the minority of the pupil is not conclusive upon him. It may be examined into afterward on settling the tutorship and rendering a final account. It was as clearly the duty

of a faithful tutor to correct such an error as was discovered in this case (an error in the tutorship account) as it would be to recover from a third person the same amount discovered to be due. In both cases the sum found to be due is the property of the minor, and its administration and final payment to the pupil at his age of majority are secured, in our opinion, by the mortgage in question;" and in Holmes vs. Henken, 6 Rob. 53, the court said: "The mortgage of a minor can be enforced against a tutor only at the termination of his functions in one of the modes provided for by law."

In Skipwith vs. Glathary, 34 An. 33, the court, discussing the effect of the Constitution of 1868 upon minors' mortgages, said: "It now becomes necessary to determine whether the general mortgage resulting from the registry of the inventory extract secures all rights of the minors as will those in existence at the date of the inventory and therein specified as those accruing thereafter. * * * The convention did not propose to destroy existing laws and jurisprudence on the subject matter, but merely to render EXPRESS a mortgage which was previously tacit or occult, the registry being intended solely to notify third persons of the existence of the tutorship and of the eventual liabilities of the tutor at the end of the tutorship in order that when contracting with the tutor they might be on their guard. The requirement of the registry was intended for the protection not only of third persons but also of minors, but not beyond the amount so recorded in any event, except by a new or additional inscription. The law has always been and is that minors have a legal mortgage upon the property of their tutors from the day of their appointment until the liquidation and settlement of their final account. C. C. 3314.

"That mortgage now to exist must be recorded and takes effect against third persons *only* from the time of inscription. The registry does not liquidate the amount appearing on it, but warns such parties that on a settlement with their tutors the minors' claim may rise to the amount stated in the registry. The mortgage formerly existing without registry in favor of minors has been held to cover not only amounts due and the liabilities of the tutor at the time of his appointment, but also the rights of the minors accruing subsequently, the mortgage being allowed as a security for the tutor's administration from the time of qualification and continuing until

the liquidation and settlement of their account, when it is ascertained what amount is due the minor.

"The mortgage which springs into existence at the date of the tutorship and of the registry of the certificate or bond has this remarkable feature, that it is assimilated to and operates like the conventional mortgage given to secure obligations which have not yet risen into existence (R. C. C. 3292), and affects third persons who have had knowledge of it, so as to subject property encumbered by it when it is necessary to do so for the satisfaction of the rights of the minors as liquidated and found at the end of the tutorship."

We think it beyond question that the mortgage resulting from the inscription of the certificate of the clerk was not intended by the law-maker to represent simply a debt then due to the minors, but was to secure up to the amount mentioned the faithful administration of the tutor and to cover his eventual liability when the tutorship shall terminate and a settlement with his ward shall be made. Succession of Kuntz, 34 An. 855.

We are of the opinion likewise that from the date of the inscription up to the closing finally of the tutorship account, the minor's mortgage up to that amount will strike all of the immovable property of the tutor owned by him during the tutorship, whether it was acquired before or after the receipt by him of particular funds, and whether at the time of that receipt he was still the owner of the property or had already sold the same.

What we here say does not of course extend to cases in which the tutor has been permitted to restrict the legal mortgage to specific property by the giving of a special mortgage. Cases of that kind would fall under the operation of the statutes providing for and regulating them and would not be controlled by general principles.

We can only apply such rules to cases before us whose actual facts fall under the statute. The proceeding is statutory, and we can not act outside of the precise terms of the law. We can not reason or act by analogy. When, therefore, the plaintiff argues, as we understand her to argue, that, had the account, which in this case has been homologated, shown a balance in favor of the minor of $50 to $75, she could have applied for and obtained a decree for the substitution for the legal mortgage on *all* her property of a special mortgage *on particular property*, and limiting the amount of this special mortgage to the small amount as shown by a present liquidation of the minor's

affairs, and releasing the balance of her property from mortgage, we simply answer that whilst that may be true for the reason that *ita lex scripta est*, and we could point to the source of our authority for so doing, her argument fails for the reason that she has not in fact done the thing from which she argues, and we know of no law which would justify us in entirely releasing or declaring entirely released, prior to the end of the tutorship and final settlement, the legal mortgage on a tutor's property resulting from his tutorship.

Even in cases where by law, in consequence of a substitution of a special mortgage on specific property for the general mortgage of the minor on the balance of the tutor's property, the court is authorized to release ALL BUT the property specially mortgaged from the minor's mortgage, its decree would have to conform in its terms to the wording of the law, and nothing in the law would justify courts in declaring the *legal mortgage of the minor entirely released*. The actual result of a decree properly rendered would in each case have to be governed by its own facts.

There is no inconsistency in the legal mortgage and the special mortgage coexisting on the specific property specially mortgaged. See Barnard vs. Erwin, 2 Rob. 407; Gurlet vs. Jure, 15 An. 417; Fleetwood vs. Bordis, 19 An. 56; McDaniel vs. Guilory, 23 An. 544; Isaacson vs. Mentz, 33 An. 595; Skipwith vs. Glathary, 34 An. 33; Succession of Kuntz, 34 An. 854.

We have alluded to the radical error which plaintiff has fallen into as to the conclusive character of tutorship accounts homologated during minority. As we have seen, they are subject to revision and correction up to and after the majority of the pupil.

When so corrected the law-maker contemplated that the minor, now come of age, should find in full force, standing as security for correction of this error, the minor's mortgage, given for the faithful administration by the tutor of his trust from its commencement to its end. Barnard vs. Erwin, 2 Rob. 407.

The defendant is not called upon to take any risks in this matter.

If plaintiff desires to have this particular property declared released from mortgage it is possibly in her power to do so by giving the special mortgage, on the right to give which, she argues to her conclusions.

As matters stand we are not authorized so to declare, nor was the district judge. Stafford vs. Villain, 10 L. 829; Bordis vs. Fleetwood, 19 An. 56.

For the reasons herein assigned it is hereby ordered, adjudged and decreed that the judgment appealed from be and the same is hereby annulled, avoided and reversed, and it is now ordered, adjudged and decreed that plaintiff's demand be and the same is hereby rejected at her costs.

Rehearing refused.

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No. 11,272.

THE STATE OF LOUISIANA EX REL. SIMON ABRAHAM VS. THE JUDGES OF THE FIFTH CIRCUIT COURT OF APPEALS ET AL.

1. Where a defendant against whom a judgment has been rendered in the District Court for an amount within the appellate jurisdiction of the Court of Appeals takes an appeal from the judgment returnable to the latter court, and the appellee moves in that court to dismiss the appeal on the ground that the allegations of the petition show a "matter in dispute" within the jurisdiction of the Supreme Court, the Court of Appeals has, for the purposes of a decision on the motion, the right to examine the nature of the cause of action, the pleadings as a whole, and the evidence and course of proceedings in the lower court, and is not restricted to the prayer of the petition.
2. When from such an examination, reaching the conclusion that allegations were inserted in the petition solely as a pretext to have recourse to the Supreme Court where the true matter in dispute is below its constitutional jurisdiction and within its own, it overrules the motion to dismiss and retains jurisdiction, its action will be sustained on application for writs of prohibition and certiorari where the record shows that had the appeal been brought to the Supreme Court it would have been dismissed *ex proprio motu* for want of jurisdiction.

APPLICATION for writs of Certiorari and Prohibition.

Clay Knobloch and *Lazarus, Moore & Lemle* for the Relator.

Beattie & Beattie for the Respondents.

The opinion of the court was delivered by

NICHOLLS, C. J. Relator represents that on the 1st of June, 1892, he filed in the District Court of Lafourche his suit against Arthur Gossin for the specific performance of a written proposition of sale

made by him and duly accepted by Gossin, by which agreement relator agreed to sell and Gossin agreed to buy the steamboat "Alexander" for the fixed price of $1750, whereof $500 was to be paid cash, $850 by Gossin's transferring to relator ten shares of the Jackson Brewing Company of New Orleans of the face value of $100 per share but of a market value of $85 per share, and the balance of the purchase price ($400) by a note of Gossin to the order of relator, payable January 1, 1893, with 8 per cent. per annum interest from date of passing the act of sale, said act to be passed immediately after the boat had passed inspection of the United States inspectors. That in his petition he averred that by said agreement he bound himself to have the boiler of the boat inspected at a cost of $145, and he caused said repairs to be made; that the boat passed inspection May 7, 1892; that Gossin declined to accept the boat and complete sale as agreed on; that relator placed him in default; that in said suit for specific performance, after alleging the refusal of Gossin without just or legal cause for not complying with the agreement, he also alleged that the said refusal had caused relator damages in the sum of $550—that is, for attorney's fees in prosecuting the suit at $250, relator's traveling expenses at $10, costs of notarial protest at $15, loss of time at $25, and exemplary damages for said Gossin's gross bad faith at $250. That in said suit he not only prayed for specific performance showing an amount in contestation of $1750, but also prayed for said damages, amounting in the aggregate to the sum of $550, making the total amount in dispute the sum of $2300. That the case was tried pursuant to assignment and resulted in a judgment on the 30th of September, 1892, in favor of relator—1st, for the sum of $500 with 8 per cent. interest from 17th May, 1892; 2d, transferring to relator the ten shares of the Jackson Brewing Company's stock, which were worth $850; 3d, condemning defendant to give his note to relator for $400, with 8 per cent. per annum interest from 17th May, 1892, until paid—all of which was in compliance with relator's petition for specific performance, but, 4th, rejecting relator's claim for damages as in case of non-suit and disallowing defendant's claim in reconvention.

That on the 1st of October, 1892, Gossin moved for a suspensive and devolutive appeal in the alternative from said judgment, returnable according to law, and later on at his own suggestion the same was made returnable to the Fifth Circuit Court of Appeals, which

appeal was perfected by his giving bond for a suspensive appeal, returnable to "the Fifth Circuit Court of Appeals," "returnable according to law."

That relator, believing that said appeal had been made returnable as it should have been to the Supreme Court on the third Monday of January, 1893, when appeals from the parish of Lafourche are returnable according to law, was present through counsel on that day and there awaited until the delay of filing an appeal had expired, whereupon he obtained from the clerk of the Supreme Court a certificate of non-filing, dated January 20, 1893, which he annexed to his petition.

That to his great astonishment he discovered when he filed with the clerk of the court of the parish of Lafourche the said certificate of non-filing that the appellant had made his appeal at his own solicitation returnable to the Fifth Circuit Court of Appeals, which, under the law, sits for the parish of Lafourche on the third Monday of February, 1893.

That on the return of said appeal in the Circuit Court of Appeals (20th February, 1893), he filed his motion to dismiss said appeal on the ground that the court was without jurisdiction *ratione materiæ*, that the amount in dispute exceeded $2200, exclusive of interest, and that the appeal should have been made returnable according to law to the Supreme Court. That despite said motion to dismiss, the said Circuit Court and its judges have usurped jurisdiction of said appeal and have overruled relator's motion and have proceeded under a rule of their court which compels appellee to submit both his motion to dismiss and the merits of the cause, to decide the merits of the cause, all to the great injury of relator and in violation of his just and legal rights in the premises.

That said Circuit Court placed relator in a position where he can not claim (1) his attorney fees of $250 to which he is entitled without proof, the court being competent to place an estimate upon such services; (2) notarial fees of protest, which courts are also competent to place value on without proof; (3) exemplary damages claimed by relator against Gossin, for gross violation of the contract sued on, which damages are never proved, and that the Circuit Court of Appeals has thus deprived relator of his claim for damages by usurping jurisdiction of a cause over which they had no jurisdiction *ratione materiæ*, and which if it had been returned to the Supreme Court re-

lator would have had an opportunity, of which he was willing, ready and anxious to avail himself, of asking an amendment of judgment by increasing the amount awarded by the District Court to $1750 by (1) attorney's fees, $250; (2) notarial fees, $15; (3) exemplary damages, $250.

In view of the premises relator prayed for writs of certiorari and prohibition directed to the judges of the Fifth Circuit Court of Appeals, to the clerk of the District Court for the parish of Lafourche and Arthur Gossin, ordering and commanding them to proceed no further in the case of relator against Arthur Gossin until this court shall have rendered judgment on the regularity and legality of the proceedings had in said Circuit Court, and that all proceedings had in said cause in the Circuit Court be decreed null and void, and that the judgment in said cause, rendered by the Eighteenth Judicial District Court on the 30th of September, 1892, remain undisturbed and of full force and vitality.

Alternative writs issued as prayed for.

The judges of the Court of Appeals substantially answered that the case of Simon Abraham vs. Arthur Gossin, No. 44 of the docket of the Fifth Circuit Court of Appeals, was passed upon by them, and was within the jurisdiction of the said court for the reason that plaintiff's demands for damages were unreal, and only intended to afford a pretext for a recourse to the Supreme Court in a cause where the true matter in dispute was below the constitutional jurisdiction of that court, and actually within that of the Circuit Court.

When the appellee filed in the Court of Appeals a motion to dismiss defendant's appeal, he invoked the action of that court and necessarily placed it on inquiry for the purposes of decision.

He concedes that the court had power and authority to pass upon the question, but he denies it had the right to examine into the nature of the cause of action—the evidence in the record or the pleadings as a whole, but maintains that it should have confined and limited itself to the prayer, and finding that the prayer showed a demand which would take the case on appeal to this court, it was bound to assume that it legally and correctly represented "*the matter in dispute.*"

That even if the demand were inflated the Court of Appeals could only entertain jurisdiction in the case, subsequently to a decision to that effect by the Supreme Court declaring a portion of the demand

fictitious—it being the right and the duty of this court to primarily determine that question.

This we understand to be substantially relator's position and contention.

The convention of 1879, which ordained "that courts should be open and that every person for injury done him in his rights, lands, goods, person or reputation should have adequate remedy by due process of law, and that justice should be administered without denial or unreasonable delay," well aware that the costs attendant upon litigation on claims for small amounts tended to deter suitors from entering into the courts, which were thus declared to be so freely open, conceived the idea of establishing for such cases an intermediate Court of Appeals, in which appeals would be tried more frequently than in the Supreme Court, and (differently from what is the case in this court) should be tried on the original record, pleadings and evidence, and not upon full and complete and expensive transcripts which have to be paid for by an appellant before delivery of the same.

This system, if the doctrine contended for by relator be correct, would not rest securely upon law, but would be essentially dependent for its execution upon the good faith of litigants. It would be in the power of plaintiffs in every case by the simple use of fictitious allegations to force defendants to reach the court of actual jurisdiction by a circumlocution which would absolutely destroy the object and purpose of the convention.

We see no good ground upon which relator's claim can be predicated.

A plaintiff's rights are in no manner prejudiced or jeopardized by action such as was taken in this case by the appellant and the Court of Appeals. That court understands perfectly well that it can with no sort of legality or propriety assume jurisdiction of any case which would fall under the operation of the rule announced in Lallande vs. Trezevant, 89 An. 880, where the seriousness and sincerity of the allegations present a fairly debatable question. We can not presume that it would retain a case on its docket unless the fictitious character of the allegations was palpable and beyond question. Assuming, however, that it were to do so, an appellee's remedy would be plain, clear and direct—he could always have recourse to this court, precisely as the relator himself has done in this instance, by way of

certiorari and prohibition for the protection of his rights. It will not do for the relator to say that he has been himself forced to a circuitous course for the protection of his own right to an alteration of the judgment of the District Court. Had he really felt aggrieved by that judgment he could have had recourse to his own substantive right of appeal, and could through it have controlled at *his* own risk (just as the defendant has done at HIS own risk) the court to which that appeal should have been primarily returned.

Instead of relying for the alteration of the judgment upon an appeal to which he was entitled by way of right, he has thought proper to depend for this alteration upon what is simply granted him in the nature of a faculty or privilege incidental to an appeal taken by some one else. A judgment creditor who takes such a course has to take it with disadvantages as well as advantages.

We have examined the record and are of the opinion that the action of the Circuit Court of Appeals in overruling relator's motion to dismiss and in retaining jurisdiction of the case of Simon Abraham vs. Arthur Gossin on appeal before it from the Eighteenth Judicial District Court for the parish of Lafourche was correct.

The nature of the cause of action, the pleadings as a whole and the absence of any attempt in the District Court to prove up any claim under plaintiff's allegations of damages all unmistakably show that those allegations were inserted in the petition solely, as was said in Poree vs. Valishe, 15 An. 292, as a pretext for a recourse to this court, where the true matter in dispute was below our constitutional jurisdiction.

In addition to this, relator's course as appellee in obtaining from the clerk a certificate of the non-filing by defendant in this court of the transcript of appeal is a very clear indication that he did not seriously complain of the judgment of the District Court, or propose to appeal from it.

The procuring of such a certificate is the step provided by the Code of Practice as that preliminary to an enforcement by a judgment creditor of the judgment as rendered below in his favor. C. P., Art. 589.

Relator's claim that without any evidence whatever in the record upon the subject of attorneys' fees, and with no attempt on the part of the district judge to fix any value upon such services, an appellate court is authorized and justified for the first time on appeal to

place an estimate upon them is not well founded. Courts have to a limited extent permitted their professional knowledge of the subject matter (when acted upon affirmatively by the lower court, on evidence in the transcript), to influence them in their judgment on appeal, but they have not done so in manner and form nor to the extent advanced here.

The issue presented to us by the relator is whether or not the Circuit Court of Appeals is now entertaining jurisdiction and will continne to entertain jurisdiction by way of appeal over a case in which it has no jurisdiction *ratione materiæ*. We hold that it is not only not doing so, but that were relator's case before this court on appeal, we would be constrained *ex proprio motu* to dismiss the appeal to this court for want of jurisdiction.

For the reasons herein assigned it is hereby ordered, adjudged and decreed that the provisional orders and writs heretofore granted and issued be set aside and relator's application be rejected at his costs.

No. 11,225.

CHARLES P. HURLEY VS. SOUTHERN EXPRESS COMPANY, GEORGE E. UNDERWOOD ET AL.

1. The facts of the case are fully discussed and the finding of the district judge approved.
2. The defence that plaintiff acquired the lottery ticket involved under a contract of sale reprobated by the law of Massachusetts, was not alleged in the pleadings and is not sustained by any proof of Massachusetts law; and, moreover, even if originating in a reprobated transaction, the transaction is completed and the results fully accomplished, and the defendant is such a *particeps criminis* as can not avail himself of such a defence under the doctrine of Brooks vs. Martin, 2 Wall. 80, and Antoine vs. Smith, 40 An. 567.

APPEAL from the Civil District Court for the Parish of Orleans. *King, J.*

Rouse & Grant for Plaintiff and Appellee.

L. C. Quintero and *Clegg & Thorpe* for Defendants and Appellants.

The opinion of the court was delivered by

FENNER, J. This suit was brought by Charles P. Hurley, of Boston, Mass., against the Southern Express Company, the Louisiana

State Lottery Company, and George E. Underwood, also of Boston, this last named being made party to the suit by amended petition. The petition sets forth that Hurley is the owner of one-fifth part of ticket No. 43,807 of the Louisiana State Lottery Company for the monthly drawing of July 12, 1892, that it is entitled by said drawing to $15,000, and is in possession of the express company for collection without title, and prays for judgment of possession and ownership of said ticket against the express company and Underwood, and money judgment against the lottery company of $15,000. Upon affidavit and bond the ticket was sequestered in the hands of the express company and is in the custody of the civil sheriff of Orleans.

The express company answered that it held the ticket for collection for account of Underwood and was interested only as stakeholder.

The lottery company answered that the ownership of the ticket was in dispute and that it stood ready to pay the money to the party to whom such ownership should be finally adjudged.

Underwood answered that he received the ticket from James W. Sullivan, of Boston, its true owner, as whose agent he lodged it with the express company for collection. He prayed judgment rejecting plaintiff's demand, and in reconvention for damages. The demand in reconvention was withdrawn, with leave to sue for damages on the sequestration bond.

The evidence was submitted to the judge of the District Court, and judgment was rendered in favor of plaintiff.

George E. Underwood, the titular defendant, and James W. Sullivan, the real defendant, prosecute this appeal.

The case presents a conflict of evidence so irreconcilable as to leave no doubt that there is a fraudulent conspiracy between one of the parties and his witnesses to rob the other of this winning lottery ticket. If Hurley and his witnesses are not lying conspirators, Sullivan and his witnesses are undoubtedly such, and *vice versa*. The question is which are the guilty perjurers?

The testimony of Hurley and Sullivan, and that of Fitzpatrick and Underwood, was taken in open court, and the judge saw and heard them testify. The other material testimony was taken under commission.

The judge weighed the testimony and sums up his conclusions as follows:

"James W. Sullivan and George E. Underwood contradict each other on three material facts in this case about which they could not be mistaken. Their manner upon the witness stand, the narrative they relate and the way they related it, contradicted as it is by Hurley, Donahoe and M. P. Linnehan, convince the court that their testimony is not only untrue but given in conjunction with that of Daniel J. Linnehan to carry out a conspiracy to steal the lottery ticket sued for in this case from the plaintiff, and to collect the prize payable on its presentation, and that it is, therefore, the result of fraud and collusion. The testimony of Whicher is laconic, evasive and therefore unreliable. Arthur Saucier, a waiter in the liquor saloon in which Sullivan and D. J. Linnehan work, was evidently the tool they used to steal the ticket, and his evidence is pointedly contradicted by Hurley, Donahoe and M. P. Linnehan.

The court is convinced that Charles P. Hurley told the truth on the witness stand. He is corroborated by Donahoe and Michael P. Linnehan, two disinterested witnesses, in different occupations from that pursued by plaintiff and defendant. He is corroborated by his own acts when he discovered the fraud that had been perpetrated upon him. He is corroborated by the suspicious acts and conduct of Sullivan and Underwood, Sullivan's brother-in-law and witness. He is corroborated by the appearance and condition of the lottery tickets offered in evidence, and further, he is corroborated by all the facts proved and the circumstances surrounding the case.

The court therefore finds from the testimony that Charles P. Hurley is owner of the lottery ticket No. 43,807 sued for in this case, having purchased it from Dan. J. Linnehan, on the 9th day of July, 1892. That it was in his possession until the afternoon of July 16, when it was obtained from him on the pretext of comparing it with the prize list, by a fraud conceived and planned by Sullivan and Daniel J. Linnehan, and carried into execution by them with the aid of Arthur Saucier, their tool, after they knew that said ticket had drawn a prize.

Without exaggerating the weight naturally and justly due to these findings of the district judge, our patient study of the voluminous testimony has only served to confirm them.

Hurley's story may be condensed as follows: that on July 9 he bought the ticket No. 43,807 from Dan. P. Linnehan, an old friend and acquaintance; that he folded the ticket and put it in the fob

pocket of his trousers; that he went to New Hampshire on his annual vacation, carrying the ticket in his pocket; that he returned to Boston on Saturday, July 16; that on that afternoon, Saucier, a waiter in the saloon where D. J. Linnehan and Sullivan were employed, came to him and said that Linnehan had sent to get the ticket to compare it with the lottery list and see if it had drawn a prize; that he took the ticket out of his pocket, tore a piece of paper out of a blank book, and in the presence of M. P. Linnehan and Donahoe wrote on the paper the number of the ticket, 43,807, and then handed the ticket to Saucier with directions to bring it back; that on the following Monday morning he saw a list of the Louisiana Lottery drawing which had taken place on July 12, and taking out the paper on which he had inscribed the number of his ticket, discovered that it had drawn one-fifth of the capital prize, amounting to $15,000; that he immediately went to D. J. Linnehan, at Englehart's saloon, and demanded his ticket; that Linnehan said he had given it to Sullivan; that when asked why he had done so, he said he had got it from Sullivan and had not paid him for it; that shortly afterward, he met Sullivan and demanded the ticket, who made denials and excuses, which need not be repeated; that he then went to the office of the lottery agent, was informed that Sullivan had presented the ticket, and was advised to telegraph and stop payment of the ticket, which was done and this suit was brought.

Now most of the facts stated by Hurley are admitted by defendant's witnesses. They do not deny that he bought a ticket from D. J. Linnehan; that he did go to New Hampshire; that he returned on the 16th; that on that day Saucier was sent for the ticket and received it from Hurley and gave it to D. J. Linnehan; that on Monday morning Hurley called on Linnehan for his ticket, claiming that it had won the prize; and that he afterward called on Sullivan and demanded the ticket that he had got from Linnehan.

The appearance of the ticket, which is produced in the original, corroborates Hurley's statement that it had been folded and carried in his fob-pocket for several days, and we are most unfavorably impressed with Sullivan's statement, made after Hurley had testified, that he (Sullivan) had folded the ticket and carried it in *his* fob-pocket for several days.

Hurley's statement as to his interview with the messenger, Saucier, and particularly as to his having copied the number of the

ticket on a paper, is confirmed by the evidence of M. P. Linnehan and Donahoe. It is infinitely more reasonable and natural than that given by Saucier, which is, on its face, almost incredible; and, moreover, the message which he says he delivered from Linnehan is entirely different from that which Linnehan says he sent. Hurley's taking down the number of his ticket before delivering it to this irresponsible messenger certainly accords with the commonest dictates of prudence. It is further confirmed by another undisputed and significant fact, that on Monday morning, after seeing the prize list, he knew and claimed that his ticket had won the prize. How did he know that, if he had not preserved the number of the ticket? Linnehan denies that he told Hurley that he had given the ticket to Sullivan; yet Sullivan admits that shortly afterward Hurley demanded of him the ticket which he had got from Linnehan. Why should Hurley have applied to Sullivan if Linnehan had not told him that he had given it to Sullivan?

Linnehan claims that the ticket which he sold to Hurley and received back from him was one of ten that he had taken from the ticket dealer, Whicher, and was returned to Whicher as unpaid for. But Whicher, though he testifies for defendant and tells all about tickets that he sold to Sullivan, does not say a word about having given any tickets to Linnehan or having received back any from him. Indeed, one of the most significant facts against defendant's testimony is the entire failure to identify or account for the ticket which it is admitted was sold to Hurley and received back from him.

We agree with the district judge that Hurley's story is in harmony with every undisputed and independent fact in the case.

On the contrary, the testimony of Sullivan and his witnesses arouses suspicion at every step.

In the first place they admit that they knew the result of the drawing on the 14th or 15th of July, and that the ticket No. 43,807 had won, and claim that it was then in Sullivan's possession.

If that be true there does not seem to be any adequate motive for the promptness with which the messenger was sent after Hurley's worthless ticket immediately after his return on the 16th, or, at least, none comparable in adequacy with that which would have resulted from a knowledge that Hurley's ticket was a winner.

In the next place it is not altogether natural that, with knowledge that Sullivan held the winning ticket on the 14th or 15th, he did not

approach the lottery agent until the 18th, the first business day after Hurley's ticket was returned.

The anxiety to get the agent to cash the ticket at a discount, and the instant forwarding of the ticket by express in the name of Underwood instead of his own, are also suspicious circumstances.

It is difficult to define very accurately the reasons which produce on the mind the impression of *vraisemblance* or the reverse in the estimate of testimony, oral or written. We might extend our analysis and criticism of the testimony in this case and exhibit additional grounds for our concurrence with the district judge, but it would only encumber the pages of our reports without profit to any one.

It is claimed that we should not convict a party and his witnesses of criminal fraud and conspiracy without the clearest proof, but the stress of that proposition in this case is relieved by the inevitable alternative presented to us of pronouncing such a sentence upon one party or the other.

It is urged that Sullivan's possession of the ticket affords too strong a presumption of his title to be overcome without the strongest proof; but, in this case, we consider his possession so accounted for as to be quite as consistent with Hurley's title as with his own. His possession has no bearing on the question of title. Its only effect is to place Hurley under the necessity of becoming plaintiff, and thereby assuming the burden of proof. He has discharged this burden in a manner which convinced the judge *a quo* and satisfies our own minds.

An attempt is made in this court to impugn plaintiff's right to stand in judgment on the ground that he is seeking to recover property acquired by him under a contract of sale of a lottery ticket made in Massachusetts and in violation of the law of that State. No such defence was set up in the pleadings and no proof is made of the law of Massachusetts. Until the expiration of its charter the Louisiana Lottery Company is authorized by the Constitution and laws of the State to issue lottery tickets and dealing therein is within the protection of the law. If the law of Massachusetts is different, that should have been alleged and proved. We think, in any case, defendant would fail in such a defence under the principles laid down in Brooks vs. Martin, 2 Wallace, 80, and in Antoine vs. Smith, 40 An. 567. The transaction, even if reprobated, is complete and the results fully accomphished, and it does not lie in the mouth of

one of two parties equally guilty to set up such a defence against the title of the other See also Gibson vs. Knard (Ala.), 11 So. Rep., p. 842.

Judgment affirmed.

Rehearing refused.

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No. 11,229.

FLOWER & KING vs. J. K. SKIPWITH.

1. The facts shown in this case justify and sustain the writs of sequestration and attachment as against the defendant.
2. Under the present Constitution, privileges on movables do not require to be recorded, but have the same validity and effect with or without registry.
3. Act 89 of 1886 establishing the rank and order of privileges on crops can not be given a retrospective operation so as to give to a pledge of the crop under Act 66 of 1874 preference over an antecedent privilege valid and subsisting at the date of the pledge. The latter takes effect on the property at its date and subject to valid antecedent privileges, and the law only refers to privileges arising subsequent to the pledge.
4. When a plantation is held by a party under a conditional agreement of sale, with authority from the owner to possess, use and cultivate the same, and under no contract of lease or rent, a merchant who advances and acquires a privilege on the crop under such conditions can not be affected by a subsequent change of arrangements and the execution of a lease creating a lessor's privilege. The lessor's privilege only arose after date of lease and took effect on the crop only as it then stood subject to the antecedent privilege.
5. Plaintiffs' right to arraign the transactions between defendant and intervenor are, under the facts of this case, limited to the extent necessary to protect his privilege—they are valid against ordinary creditors.

APPEAL from the Eighth District Court, Parish of Concordia. *Thompson, J., ad hoc.*

J. N. Luce and *Harry H. Hall* for Plaintiffs and Appellants.

S. L. Elam contra.

The opinion of the court was delivered by

FENNER, J. J. K. Skipwith had been the lessee of Ashland plantation, belonging to R. F. Learned, during the year 1890, and Flower & King had furnished him supplies and advances for the cultivation of same during that year.

In September, 1890, an agreement was entered into between Learned and Skipwith, by which the former agreed to sell to the

latter the plantation with all buildings, improvements, mules, implements, crop and movables, and all claims against hands or tenants, for the price of $20,000, of which $2500 was to have been paid in cash on December 1, 1890; $2500 in cash on January 1, 1890, and the balance in eight promissory notes maturing annually. It was agreed that Skipwith was to go into immediate possession, but that title was not to pass until payment of the $5000 cash as stipulated.

Skipwith paid $2000 on account of said cash payments, and it was agreed between them that the balance should be deferred until the fall of 1891. Under this agreement and extension Skipwith was in possession and control of the property, when in January, 1891, he applied to Flower & King for advances for its cultivation during 1891. He represented to them his purchase on long time, and his partial payment of the price, and obtained their consent to advance him $3000 to make his crop, obligating himself to ship them all cotton raised or controlled by him, guaranteed at 300 bales, and subjecting the crop to their privilege as furnishers of advances and supplies.

Plaintiffs advanced the $3000 as agreed, and on May 19 they wrote to him the following letter:

"*J. K. Skipwith, Esq.:*

"DEAR SIR—Enclosed we hand you the itemized statement of account, showing a balance to your debit of $3356. Please examine and report upon at your leisure. You see the account is overdrawn three hundred and odd dollars. This year promises to be a very close one, and we must adhere closely to the contracts as made. We have taken every dollar's worth of business that our means will stand, and to extend contracts will take it beyond the limit of our ability, and we have already been compelled to decline a large amount of new business and applications to extend contracts as closed.

"Yours truly,

"FLOWER & KING."

With the letter they enclosed an itemized statement of his account. They received no reply; but after the date to which the account was made up, they received several drafts from defendant which were duly paid.

So matters stood until about the beginning of the shipping season, when Skipwith called on plaintiffs and made some complaint of

errors in the account, and then stated that he had a fine crop which would more than pay all his liabilities. The latter statement was repeated at another interview, with the additional statement that cotton was low and there was no hurry about shipping.

On November 3, receiving no cotton, plaintiffs wrote him as follows:

"We have not had a letter from you for some time and no shipments. This is the season of the year when our load bears most heavily upon us, and we expect relief from those whom we have aided during the year."

They still received no reply and no cotton, and subsequently ascertaining that Skipwith was shipping the Ashland cotton to various other merchants in this city, they instituted this suit against him, accompanied by writs of sequestration and attachment, seizing under the sequestration cotton, cotton seed, corn and other products, and, under the attachment, the same and other property.

They, thereafter, learned for the first time that Skipwith and Learned had entered into the following transactions: On May 21, 1891, Skipwith sold to Learned all his mules on Ashland plantation for the price of $1250, which was retained by Learned on account of cash payment on plantation. On the next day, May 22, Learned leased to Skipwith the plantation, mules, etc., for $3000, payable on November 1, with the following stipulation:

"The said Skipwith being desirous of purchasing the Ashland plantation, and having entered into a written agreement with the said Learned, in which the latter has obligated himself to make title to said Skipwith on certain conditions. Now should the said Skipwith pay to the said Learned the amounts agreed to be paid in said contract (to sell) and comply fully and faithfully with the terms thereof, and with a certain supplemental contract relative to the extension of the terms of payment made in the original contract, etc., then this obligation to be null and void, otherwise to remain in full force and effect."

On the 1st of June Learned entered into a contract by which he agreed to advance Skipwith $2000 for the cultivation of his crop and took from him a formal pledge of said crop under Act 66 of 1874, which was duly recorded.

On October 3, 1891, Learned took another similar pledge from Skipwith for a further sum of $4000, which was also recorded.

On December 3, 1891, R. F. Learned, represented by same counsel who represented defendant, filed a petition of intervention, setting forth that he leased the Ashland plantation to defendant, May 22, 1891, for $3000; that in June and October, 1891, defendant pledged to him his crop; that he advanced $3700 under said contracts of pledge, and he claimed a privilege as lessor and as pledgee and furnisher of supplies, superior to all persons.

On December 9 the defendant, Skipwith, filed a motion to dissolve the attachment and sequestration on the ground that the affidavit on which they were issued was untrue. This motion was heard and overruled by the judge.

On January 19, 1892, plaintiffs took out *alias* writs of attachment and sequestration, under which they seized the same property before seized, and also the mules and other property.

By an amended petition of intervention Learned avers the sequestration and attachment of mules, wagons, etc., and his ownership thereof, but says that if not his property he has a lessor's privilege thereon.

The defendant moved to dissolve the *alias* writs of sequestration and attachment on the ground that the affidavit was untrue.

Plaintiffs answered Learned's intervention, averring that the sale of stock and the lease were simulated and fraudulent, and that their privilege for advances primed and outranked the pledges of Learned on the crop.

After hearing the court rendered judgment maintaining the motion to dissolve the writs of attachment and sequestration, sustaining the intervention of Learned for lease and supplies, giving plaintiffs an ordinary judgment for the debt against defendant and sustaining the demand of plaintiffs to have the expenses of gathering and shipping the crop seized as costs, from which judgment plaintiffs have appealed to this court.

We think the judgment was clearly erroneous in dissolving the writs of sequestration and attachment. The acts of defendant, as heretofore detailed, fully justified their issuance. Defendant had disposed and was disposing of his crops and property with the plain purpose of defeating plaintiffs' privilege and debt. As against him the writs should have been sustained.

We consider it equally clear that there was errror in denying

plaintiffs' privilege on the portion of the crop seized under their sequestration.

Plaintiffs' privilege was antecedent both to the pledges of intervenor and to the lease, and was entitled to preference over both, so far as the crop is concerned. Their privilege is granted by the express terms of Art. 3217 of the Civil Code.

Art. 177, Constitution 1879, provides that "privileges on movable property shall exist without registration of the same, except in such cases as the General Assembly may prescribe by law after the adoption of this Constitution."

No action on this subject has been taken by the Legislature; therefore this privilege is perfect as to all the world without registry.

The Act 66 of 1874 authorizes the pledge of crops for advances and supplies, which take effect when recorded; but it does not repeal Art. 3217, C. C., nor does it require the record of such privilege as an essential to its validity. On the contrary, it expressly declares that the pledge is granted "in addtion to the privilege now conferred by law."

Great stress is laid on Act 89 of 1886, which provides that "privileges and pledges granted by existing laws of this State shall be ranked in the following order of preference: (1) Privilege of laborer; (2) Privilege of lessor; (3) Privilege of the overseer; (4) Pledges under Sec. 1 of Act 66 of 1874, in order of recordation; (5) Privileges of furnishers of supplies and of money and of the physician."

It is claimed that, under this statute, a pledge of the crop, no matter when made, divests the rank of all antecedent privileges. We can not approve such a construction. Courts do not readily give retrospective operation to a statute. We think the act only refers to the future and gives a preference to the pledge over any privilege subsequently acquired. If Flower & King had continued to advance after recordation of the pledge, such advances might be subordinated to it in rank, even if made before the advances under the pledge had been actually made, and all privileges for supplies and advances subsequently acquired would share the same fate, even though but for the recordation of the pledge they might have been superior in rank. But to say that a privilege legally existent and valid as to all the world could be destroyed or impaired by a subsequent pledge shocks all sense of justice and would open a door for

fraud under which every merchant, after advancing to the near completion of the crop, might find his privilege destroyed by the recordation, at the last moment, of a pledge to some third person for future supplies. Obviously, the crop passed under Learned's pledge, subject to the pre-existent privilege of plaintiffs, which was not displaced or affected thereby.

It is claimed, however, that, in this case, Learned should have a preference, because the crop on which the advances of plaintiffs had been expended had been destroyed by overflow; that they had refused to make further advances, and that, but for Learned's advances, there would have been no crop. This position can not be sustained for several reasons. In the first place, the advances of plaintiffs had not been expended merely in planting the destroyed crop. They had been used in organizing the place for cultivation during the year, in employing and feeding laborers and in like necessary measures which must be taken in the beginning of the year and without which no crop could be made. Moreover, Learned himself testifies that, at the date of his pledge, the crop had been planted and was then on the ground. Finally, it does not appear that plaintiffs had, or would have, refused to make further necessary advances. It is true they wrote the letter of May 19, but their subsequent payment of further drafts shows that it was a mere letter of warning, and everything indicates that if Skipwith had made a proper showing of his situation they would not have refused him further necessary assistance. Skipwith's conduct toward them was, to say the least, uncandid and deceptive. Instead of first giving them the chance to protect themselves, he hastens to deal with a third person and to take all possible steps to defeat their just rights. Nor can we exculpate Learned from complicity. He knew that plaintiffs had been advancing to Skipwith and if he chose to act without informing himself as to the fact, it was his fault and he should bear the consequences. He has already received and appropriated a large part of the crop and he can not contest the priority of plaintiffs on the portion seized. We think the same reasoning applies to his claim for a lessor's privilege, so far as the crop is concerned. At the time when plaintiffs' advances were made Skipwith held the place under an agreement of sale and with the full consent of Learned and with his authority to use it and raise a crop thereon without any lease or contract for the payment of rent. Learned could not thereafter im-

pair the privilege acquired by plaintiffs by altering his arrangements, making a lease and thus subjecting the crop to an *ex post facto* lessor's privilege. The latter privilege only came into being with the execution of the lease and took effect on the crop only as it then stood subject to the valid antecedent privilege of plaintiffs.

We think, however, that plaintiffs' right to arraign the transactions between Learned and Skipwith is limited to the extent necessary to the protection of their privilege on the crop. Considering the relations between them in regard to the plantation there was nothing wrong in Learned's taking the mules as a partial payment or in his making the lease, which does not seem to us to be unjust or unreasonable.

It was fair that, in case the conditional sale was not carried out, Learned should receive a rent for the use of his property, and ordinary creditors have no right to complain thereof.

Plaintiffs are, therefore, entitled to a superior privilege on the cotton, cotton seed and other crops sequestered and attached, and to a privilege as attaching creditors on the balance of the property seized, subordinate however to the lessor's privilege of Learned, which is to be first paid out of the latter property.

We may add, to avoid misapprehension, that plaintiffs' take nothing by their so-called seizure of the interest in Ashland plantation and of store accounts. Defendant has no interest in the plantation subject to such seizure, and will have none unless the conditional sale shall be carried out. If not carried out, whatever claim he may have against Learned will be of a personal character and, like the store accounts, is an incorporeal right, which can not be seized in the manner here pursued.

We have considered all the other points made by counsel on all sides, but find nothing in them affecting our conclusions.

It is therefore adjudged and decreed that the judgment appealed from be and is hereby amended so as to maintain the writs of sequestration and attachment against the defendant, and further, so as to recognize their privilege on the crops sequestered and attached, with preference over R. F. Learned, intervenor; and with recognition of their privilege as attaching creditors on the other property seized, herein subordinate however to the lessor's privilege thereon of Learned, intervenor; and that, as thus amended, and in other respects, the judgment be affirmed, appellees to pay cost of appeal.

ON APPLICATION FOR REHEARING.

Plaintiffs call attention to failure in our decree to pass on costs in lower court, which was also omitted in judgment appealed from. They properly fall on defendant. They also complain of our failure to pass on their demand for recognition of their privilege on proceeds of cotton received by intervenor. Those proceeds were not seized under any process and were not in the hands of the court. We therefore did not consider or pass on that claim.

It is therefore ordered that our decree be amended by condemning defendant to pay costs of the lower court, and that as thus amended it remain otherwise undisturbed.

No. 11,261.

THE STATE OF LOUISIANA VS. FAUSTIN FONTENETTE.

In the absence of an arraignment of the accused there can be no valid conviction.

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APPEAL from the Nineteenth District Court, Parish of Iberia. *Voorhies, J.*

M. J. Cunningham, Attorney General, for the State, Appellee.

A. & Chas. Fontelieu for Defendant and Appellant.

The opinion of the court was delivered by

WATKINS, J. The defendant was indicted for stabbing, cutting, striking or thrusting, and was found guilty of stabbing with intent to kill; and upon conviction was sentenced to three years' imprisonment in the penitentiary and has appealed.

Our attention has been attracted to one fatal defect in the record which necessarily disposes of the case, and that is the failure of the record to disclose that the defendant had been arraigned previous to trial.

The minute entries are as follows, to-wit:

"Indictment filed and bench warrant ordered to issue." October 11, 1892. "Court met pursuant to adjournment * * * Case assigned for trial for the 27th inst." February 23, 1893. "Case taken up on the day set for trial." February 27, 1893.

There is no suggestion anywhere in the record of the defendant having been arraigned before the trial; nor is there anything to show that he urged any special defence or plea that is tantamount to an acknowledgment of the jurisdiction of the court, or a waiver of his right to arraignment.

In the absence of arraignment there can be no valid conviction. This is elementary. State vs. Revills, 31 An. 387; State vs. Christian, 30 An. 367; State vs. Epps, 27 An. 227; State vs. Robinson, 36 An. 873; State vs. Boyd, 38 An. 374; State vs. Harrison, 38 An. 501.

The judgment appealed from must be reversed and the cause remanded for a new trial.

It is therefore ordered and decreed that the judgment appealed from be annulled, avoided and reversed, and it is further ordered and decreed that the cause be remanded to the lower court for a new trial according to law.

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No. 11,278.

THE STATE OF LOUISIANA VS. POMP JOSEPH.

1. Notwithstanding the proof shows that the general *venire* from which both the grand and petit juries were drawn was exclusively composed of persons of the white race, or of Caucasian descent, and did not contain a single colored person, or one of African descent, it does not furnish conclusive evidence of discrimination against the latter, on account of race or color, within the intendment to the Fourteenth Amendment of the Constitution of the United States, it being shown that only eighty names had been added at the term by the jury commissioners to the general *venire* for the purpose of keeping the general venire box up to the required maximum of 300.
2. When the requested special charge to the jury is, that "if from all the facts and circumstances the prisoner honestly believed his life was in imminent danger," same is fully responded to, and covered by the general charge, which declares that "if from the acts, declarations and conduct of the deceased, at the time, the *deceased* had reasonable ground to believe that his life was in immediate danger," and that "if he had apparent reason to believe, and did believe, that the deceased was about to make a violent attack upon him."
3. It is not sufficient proof of misconduct of a juror to justify the setting aside of the verdict of the jury, that he had taken, during the progress of the trial, a memorandum of parts of the testimony of some of the State's witnesses, it fully appearing that same was not exhibited to other members of the jury, and was destroyed by him without making use of it himself.
4. Neither precept of law or precedent in our own reports justifies the request of the defendant that the State's counsel shall make written answer to a motion to quash an indictment, either admitting or denying the allegations thereof.

5. Under exceptional circumstances it is permissible for the trial judge to correct a statement of fact in a bill of exceptions after same has been signed and filed.

APPEAL from the Ninth District Court, Parish of Red River. *Hall, J.*

M. J. Cunningham, Attorney General, and *J. B. Lee*, District Attorney, for the State, Appellee.

J. C. Egan & Son and *Pugh & Wilkinson* for Defendant and Appellant.

The opinion of the court was delivered by

WATKINS, J. The accused was indicted for murder, and was found guilty of manslaughter and sentenced to imprisonment in the State penitentiary for a term of five years, and from the judgment and sentence has appealed.

I.

The first proposition tendered for consideration is that embraced in the defendant's motion to quash the indictment on the ground that the venire drawn by the jury commissioners from which the grand and petit juries were drawn was exclusively composed of persons of the white race and did not contain the name of a single person of the black, or African, race, and that the accused, being of African descent, he was discriminated against solely on account of his race or color, in violation of his civil rights under the Fourteenth Amendment to the Constitution of the United States.

On the trial of this motion to quash there was a great deal of testimony taken, and it is incorporated into the transcript; and it fully establishes the fact that there was not a single person of African descent drawn on the *venire* at the term of court at which the indictment against the accused was found, notwithstanding the fact that there are a greater number of colored than of white voters in the parish of Red River, and that some of the colored voters can read and write.

But the proof shows that, as a general rule, the negroes of that parish are illiterate, and that a large majority of them are employed

as day laborers on cotton plantations and are frequently moving from place to place.

The clerk of court, one of the jury commissioners, was sworn as a witness and testified as to the manner of the drawing of the *venire* and said:

"There is a general venire box, in which there are 300 names. On the 20th of January, 1893, the commissioners met to draw the jury for the March term, 1893, and we put in eighty names to complete the *venire*. There was not a negro's name put in the box of eighty names. After these eighty names were put in the general *venire* box, eighty names were drawn out to serve at the March term, 1893, and out of the jury drawn for this term no negroes were drawn. When the jury commissioners met to draw the jury the time before the last, I do not know whether any negroes' names were put in the *venire* box or not; but I do know that they were generally whites."

Another member of the jury commission testified that "there was no negro drawn to serve on the *venire* at this term. The commissioners put in the general *venire* (box) enough names to keep the number up to 300. The names were selected by the clerk before we came down. This is the way it is usually done (and) the jury commissioners ratified his selection. I do not think the colored people (were) excluded on account of their race and color. We usually take a few intelligent ones. * * * I don't think there are many colored men in the parish that can read and write (though) there are some * * * It is a fact that some white jurors can not read and write. * * * The preference is given (to) the more intelligent."

While it is undeniable that the exclusion from the general *venire* of all people of the African race on account of their color, or race, would be an abridgment of the privileges and rights of such citizens, within the meaning and intendment of the Fourteenth Amendment of the Federal Constitution, and would operate a denial to persons of that race who might be indicted, of the equal protection of the law, within the meaning of *Strander* vs. *West Virginia*, 100 U. S. 303; yet, in our conception, the evidence does not disclose such a case.

For it appears that there are in the general *venire* box three hundred names, from which are drawn the names which compose the general *venire*, from which the grand and petit juries are drawn. That at an ensuing term of court only a sufficient number of names is added by the jury commissioners to keep the general *venire* at

that standard; that following this rule, the jury commissioners on this occasion put into the box eighty additional names, and from the three hundred names therein, the grand and petit juries were drawn. It is quite true that all the names that were drawn from the box were those of white people, though it is not established by any testimony in the record that all of the three hundred names in the general box were those of white people. This is destructive of defendant's theory, because he had the chance of some colored persons being drawn from the box, unless it was exclusively made up of the names of white persons. And in addition to this argument is the fact sworn to by one of the jury commissioners, that people of African descent were not excluded from the *venire* box on account of their race or color.

The motion to quash was properly overruled.

II.

The defendant's counsel requested of the trial judge that he should give the jury the following special charge, viz.:

"If you find from the evidence that the deceased and his brother were waiting at the gate, one or both armed for the purpose of provoking a difficulty with the prisoner, and in furtherance of such purpose, when the prisoner reached the gate arrested his attention, and made an effort to draw a pistol; and if from all the facts and circumstances the prisoner honestly believed his life in imminent danger, he was not obliged to wait until the deceased actually drew his pistol but was fully justified in drawing his pistol and taking the life of the deceased."

It was refused for the following reasons, to-wit:

"It is hardly a correct statement of the law. It makes the defendant's belief sufficient to justify his act without requiring that such belief should have been even apparently well founded, or a reasonable belief.

"It is not a correct statement of the facts or the evidence; but such a blending of those that were proved with those that were not proved as to be misleading to the jury. There was no evidence that the deceased and his brother were waiting at the gate to provoke a difficulty. Besides, the law applicable to the case is believed to have been fully and fairly stated in the written charge already given before this (special) charge was asked for, and that the special charge

as far as applicable to the case was substantially covered by the general charge. The court is only obliged to charge the law applicable to the evidence in the case, and is not obliged to charge the law unsupported by any evidence."

An examination of the judge's written charge to the jury shows that he gave instructions to the jury in reference to the law of self-defence, and from the charge we make the following extract, viz.:

"The defendant claims that the killing was done in self-defence and therefore no crime. The law of self-defence is that a person may repel force by force in defence of his person against any one who endeavors by violence or surprise to take his life, or commit a known felony upon him; and in the exercise of this right, *if a person is assaulted with a deadly weapon* he is not obliged to retreat, but may pursue his adversary until he finds himself out of danger. A person has the right to act upon appearances, and if *from the acts, declarations and conduct of the deceased*, at the time, the accused had *reasonable ground* to believe that his life was in immediate danger, he has the right to defend himself without further delay, even though it should afterward appear that there was no danger at all. * * * Therefore, if you should believe (from the evidence) that the accused was attacked violently by Tom Vinson (the deceased), or that Tom Vinson drew or attempted to draw his pistol, and that *he had apparent reason to believe and did believe that Vinson was then about to make a violent attack upon him, and that the prisoner then killed Vinson to save his own life, such killing would be self-defence and no crime.*" (Our italics.)

In our opinion the judge gave to the jury correct instructions upon the law of self-defence; and, what is more to the purpose, in very nearly the terms of the requested special charge. For instance, the request of the *special* charge is that "if from all the facts and circumstances the prisoner honestly believed his life was in imminent danger;" while the terms of the *general* charge are, viz.: "if from the acts, declarations and conduct of the accused, at the time, the accused had reasonable ground to believe that his life was in immediate danger;" and also, that if he had apparent reason to believe and did believe that (the deceased) was about to make a violent attack upon him.

If there be any real and substantial difference between the terms of the charge requested and refused and the one given to the jury, the latter is the more favorable to the accused.

The special request made by counsel for the prisoner was that the judge should charge the jury that it was sufficient that the prisoner "*honestly believed* his life was in imminent danger," whilst the instruction actually given was that "if the accused had *reasonable ground to believe* that his life was in immediate danger," or "that he had *apparent reason to believe* and *did believe* that the deceased was about to make a violent attack upon him."

It will be observed that the phrase "honestly believed" of the requested special charge is not employed in the general charge, but the phrases therein employed are "*reasonable ground* to believe" and "*apparent reason* to believe and did believe." And it seems apparent that the one selected by the judge is a stronger term than the one the counsel employed.

In so far as the hypothetical statement of fact which prefaces the requested special charge is concerned, we must accept the theory of the judge; and particularly in view of the testimony that is brought up by the defendant in a bill of exceptions. A careful examination of the requested special charge and a comparison of it with the general charge has satisfied us that the ruling of the judge below was correct.

III.

The next ground of objection taken to the ruling of the trial judge is that in refusing the defendant a new trial. The only ground assigned for a new trial that is independent and not covered by other pleadings and rulings in the case is, that one of the panel of the petit jury made a memorandum of the testimony of some of the witnesses and carried same into the jury room with him. The contention of defendant's counsel is that the juror in question did make a memorandum of the testimony of the first two witnesses on the part of the State and carried it into the jury room with him; and that, on that account, great injury was done to the accused by such garbled and *ex parte* statement. As a witness on the trial of the rule for new trial, the juror in question testified as follows, to-wit:

"I was one of the jurors who tried Pomp Joseph. I took down some of the testimony. Took some of the testimony of the second witness. I noticed the counsel for the defendant looking at me, and one of the jurors behind me told me I had better quit writing. I then stopped writing and put the paper in my pocket. The testimony that I took down was of the first two State witnesses."

On cross-examination he said: "What I wrote was on the backs of letters. I wrote two or three lines—the principal part of what the first witness said—during the time the second witness was on the stand. I did not show the writing to any of the other jurors. The case lasted all day and up to 10 o'clock at night. I used it after I got into the jury room—I tore it up. They stopped me before I got enough to be (of) any benefit to me and I tore it up. I tore it up soon after going into the jury room, and about eight hours before the verdict was rendered."

Q. "How much did you write?"

A. "I wrote three or four lines five or six inches long across note paper. The defendant's counsel saw me and one of the jurors called my attention to it. The defendant's counsel made no objection to the court. * * * I looked at the memoranda after I went to the jury room, and there was so little of it that it was of no benefit, and I tore it up."

This evidence fails to support the charge of misconduct of the juror—at least such misconduct as will vitiate the verdict of the jury.

The memorandum made was short. It was not exhibited to other jurors. It was torn up after the juror went into the jury room, and several hours before the verdict was rendered. The juror states that there was so little of it it was of no use to him and he destroyed it.

It is impossible to conceive of any injury resulting from so slight an indiscretion, or that an irregularity such as this could have prejudicially influenced the jury, or caused them any bias in their deliberations.

It is not for every irregularity in the conduct of a juror that the verdict of a jury may be set aside. The testimony must show, at least presumably, that the irregularity gives rise to a presumption of injury having been sustained by the accused.

This objection is not well taken.

IV.

The next objection urged was that a confession of the accused offered in evidence was not free and voluntary, and consequently not admissible. But the judge states that the witness answered that the confession was free and voluntary, and that no threats or inducements were offered the accused to induce the confession made.

V.

Counsel having filed the motion to quash that is discussed in paragraph one of this opinion, called upon the district attorney to make a written answer to the same, either admitting or denying the allegations thereof, and he declined, and to his refusal he retained a bill of exceptions, the judge having declined to sustain the point made on the ground that there is neither rule of law or precedent to support the proposition.

This objection possesses the charm of novelty, but nothing more.

VI.

The counsel for the prisoner complains that the judge after having signed and caused to be filed a bill of exceptions, of his own motion, on the following day, without rule to show cause or other proceeding, made an *addendum* thereto, and to which they objected on the ground and for the reason "that the judge has no right or authority to change the minutes of his court, or to amend, or add to his rulings, and more especially add to, amend, or alter bills of exceptions after the same become final and become a part of the record of the case."

The judge overruled the defendant's objections and maintained his right to make the alteration on the ground, to-wit:

"During the examination of the witness, Booth, counsel for the defendant asked that the proper basis be laid before the confession was admitted, and the district attorney asked him the usual questions, in reply to which the witness said that it was free and voluntary, and that no threats or inducements were offered defendant to produce it. The defendant's counsel then cross-examined him as to his remembering all that was said, and during this cross-examination asked that his evidence on the question of confession be taken down, which was done, from that point onward, ending with the words 'I don't know, Mr. Booth, what I killed him for.' This evidence was embodied in the bill of exceptions presented on yesterday by the defendant and signed by the court, without remembering, at the moment, to include what the witness had said before we began to write down his statement. This morning in open court, in presence of the accused and his counsel, the court announced the fact of this omission and its intention to add this statement of Booth's evidence in the bill No. 1. Defendant's counsel objected for reasons

above stated, but made no suggestion or pretension that the witness did not so testify. To which ruling counsel excepted," etc.

A bill of exceptions is merely an exception to the opinion of the court on some purely incidental question that arises during the progress of the trial of a cause, and involving either a question of fact or law, and to which the judge is required to make a concise statement of the reasons influencing his opinion. When thus prepared and signed by the presiding judge, it must be filed among the records of the suit. C. P. 488 and 489.

In the instant case the bill of exceptions referred to involves a question of fact, and the trial judge evidently sought by the amendment he made, to correct a mistake or omission which, in his opinion, affected the question under consideration seriously. It was part of the statement of the accused which formed an essential ingredient of his confession.

It seems to us quite reasonable that the judge should have entertained this view; and that he had a right to make the amendment under the circumstances related we think is clear.

While a bill of exceptions constitutes, when signed and filed, a part of the record, yet, for the purpose of accuracy and correctness of statement, it is under the judge's supervision and control, during the progress of the trial, like the minutes of his court. And it has been uniformly and repeatedly held that the latter may be corrected conformably to the facts; and no doubt is suggested by defendant's counsel as to the accuracy of the amendment.

This cause appears to have been tried with great care, and a marked degree of industry and ingenuity has been bestowed on its preparation, but we have arisen from a careful study of the record with the clear conviction that the accused has had a fair trial.

Judgment affirmed.

No. 11,252.

THE GUNNING GRAVEL AND PAVING COMPANY VS. CITY OF NEW ORLEANS.

45 911
112 813
e112 814

45 911
122 682

45 911
e124 867

The City Council of New Orleans has the right to designate the material with which a street may be paved.

The city charter requires that the furnishing of material for public works shall be given to the lowest bidder; but there is a proviso that the Council may reject any and all bids. This proviso in the charter was to obtain the material

and the work at the lowest possible cost to the tax-payer after competition among bidders, and the proviso was intended for the same public interest—to protect the tax-payer from imposition, and while inviting competition to secure good material and responsible contractors.

While the City Council would not be justified, and the courts would intervene to protect the tax-payer in such event, to arbitrarily reject a bid, and thus defeat the object to be attained by competition, it is vested with a certain discretion in rejecting bids, which will not be controlled when exercised with prudence in the public interest.

APPEAL from the Civil District Court for the Parish of Orleans, *King, J.*

E. M. Hudson and *Gilmore & Baldwin* for Plaintiff and Appellant:

1. Of every municipal corporation, the charter or statute by which it is created is its organic act. Neither the corporation nor its officers can do any act, or make any contract, or incur any liability, not authorized thereby. All acts beyond the scope of the powers granted are void. Much less can any power be exercised, or any act done, which is forbidden by charter or statute. These principles are of transcendent importance and lie at the foundation of the law of municipal corporations Dillon on Municipal Corporations, Sec. 89, and cases there cited; Sec. 457, and cases there cited; Siebrecht vs. New Orleans, 12 An. 496.

2. Where the charter of a municipal corporation requires that all contracts for public works shall be let to the lowest bidder, after advertisement, the corporation must act in strict conformity to the charter and statutes, and confine itself to the *mode* pointed out by law, which mode is the measure of its powers, otherwise the action of the corporation will be void. Dillon on Municipal Corporations, Secs. 446, 467, 468; People vs. Gleason, 121 N. Y. (Court of Appeals), 634, 635.

3. When contracts for public works are prohibited by the charter of a municipal corporation to be let, except to the lowest bidder, after full and free competition, no practical competition is possible where there can be but one bidder, because of a monopoly possessed by that bidder. To hold otherwise would be a farce on justice, and will not, therefore, be tolerated by the law. Nicholson Pavement Company vs. J. B. Painter, 65 Cal. 699; Nicholson Pavement Company vs. John Fay, 65 Cal. 695; Dean vs. Charlton, 23 Wis 590; Burgess vs. Jefferson, 21 An. 143; Barber Asphalt Company vs. Gogreve, 41 An. 251; Buckner vs. Hart, Circuit Court of Appeals, Fifth Circuit, not yet reported; Sherlock vs. Village, etc., 68 Ill. 530.

4. An injunction will issue to prevent the carrying into effect of an ordinance passed by a municipal corporation which is beyond the scope of its powers or prohibited by statute, whether passed under the pretence of observing the forms of law or not. Also, to prevent an illegal diverson of public funds. Kerr's Injunction, ch. xxiv, 5, pp. 572 *et seq.*, also Note 1 to same; People vs. Mayor, etc., of New York, 32 Barb. 35; High on Injunctions, Secs. 1241, 1275 and 1287.

E. A. O'Sullivan for Defendant and Appellee.

Farrar, Jonas & Kruttschnitt as *Amici Curiæ.*

The opinion of the court was delivered by

McENERY, J. Under specifications submitted to it by the city engineer, the City Council of New Orleans by ordinance directed the comptroller to advertise for sealed proposals for the paving of the wood side of St. Charles street from its intersection with Louisiana avenue to the terminus of the present pavement on the river side of St. Charles avenue with Rosetta or Hoskius gravel. On the 26th day of October, 1892, the comptroller advertised for sealed proposals, as directed by the City Council, to be received at his office until the hour of 12 M. on Wednesday, November 2, 1892.

The advertisement required a deposit of $50 and a certificate of said deposit to accompany each bid.

On the day, November 2, 1892, before the hour of 12 M., the limit when said sealed proposals were to be received, the plaintiff, a foreign corporation domiciled in the city of Vicksburg, State of Mississippi, owner of beds of gravel in said State, having previously made the deposit of $50, presented and filed a sealed bid for paving said St. Charles street in accordance with the advertisement.

The Rosetta and Hoskins Gravel Company also presented bids.

The plaintiff's bid was the lowest, but was rejected by the City Council and the bid of the Rosetta Gravel Company accepted.

There was no answer filed by the city on the rule to show cause why an injunction should not issue, and there is no evidence in the record other than that of the existence of the plaintiff corporation, the bid, and the acts of the Council and the comptroller. There was judgment for the city, and the plaintiff corporation appealed.

We are therefore compelled to decide this case mainly upon the facts alleged by plaintiff, and the official acts of the city government.

We infer from the petition that the Rosetta, Hoskins and Gunning gravel are about of the same quality, and that the names given to the gravel are more to distinguish the several companies than to designate any particular superiority of the gravel. They are not patent processes exclusively controlled by the owners of the patent, which would exclude competition. They are natural deposits, and there is

nothing in the record to show that the bidding was intended to be confined to the two companies designated in the resolution of the City Council and the comptroller's advertisement. The Council had the undoubted right to say with what material the streets should be paved. It selected the Rosetta or Hoskins gravel, but did not say that the companies owning the gravel should be awarded the contract. Other persons could have bid to do the paving with this material, and there is no evidence to show that it could not be procured by the bidder from the companies owning the material.

The city charter requires that the furnishing of material for public works shall be given to the lowest bidder, but there is a proviso that the council may reject any and all bids. This proviso in the charter was to obtain the work and material at the least possible cost to the tax-payer, after competition; and the proviso was intended for the same public interest and economy, to protect the tax-payer from imposition, and while inviting competition to secure good material and responsible contractors.

While the City Council would not be justified, and the courts would intervene to protect the tax-payer in such event, to arbitrarily reject a bid, and thus defeat the object to be attained by competition, it is vested with a certain discretion in rejecting bids, which will not be controlled when exercised with prudence in the public interests.

In rejecting plaintiff's bid, we are of the opinion that the City Council acted with prudence and in the interest of the tax-payer to get material which had met with the approval of the tax-payers and to obtain a responsible contractor.

We presume from the circumstances of the case, and the absence of complaint by the tax-payers of New Orleans, although there is no direct proof of the fact, that the two rival companies, the Rosetta and the Hoskins, were well known contractors and dealers in gravel in the city.

The plaintiff is a foreign corporation, and put in an appearance on the last day on which bids were to be received. There is no evidence that it had shown that gravel owned by it was equal or superior to that of the Rosetta Gravel Company, or that it had given any evidence of its ability to do the paving with skill, and to respond in damages for inferior work. The statements to this effect are *ex parte* and its ability to do the work skilfully and to respond in damages are speculative.

Judgment affirmed.

ON APPLICATION FOR A REHEARING.

NICHOLLS, C. J. It would appear from an inspection of plaintiff's petition that it contains two distinct demands presented in the alternative.

On averments by it deemed sufficient to carry with them the nullity of the ordinances authorizing the paving of St. Charles Avenue and everything done thereunder, plaintiff prayed that those ordinances and all said proceedings be decreed null and void; but anticipating a possible adverse decision upon this demand it set out allegations of a different character, and prayed that *in the event* the ordinances *be held valid* that then in that event the contract under the ordinance be awarded to it.

In refusing plaintiff's accompanying prayer for an injunction the district judge assigned no special reasons, and we are left in doubt as to the grounds upon which he based his action.

The opinion which we have rendered in the case shows on its face that we passed by almost unnoticed the first branch of the petition and went directly to the consideration of the second. It was perfectly obvious to us that *quoad* the action for the declaration of the *nullity of the ordinances* the plaintiff had no standing in court.

The plaintiff described itself as a corporation organized under the laws of Mississippi and having its domicil at Vicksburg. It did not aver it was doing business in this State, that it had any agent here, that it had any property in New Orleans, or that it paid a dollar of taxes there, and it is quite likely that the judge of Division "B," finding no allegation tending to show any *legal interest in the plaintiff* such as to authorize him to invoke the nullity of the ordinance in question, refused the injunction for that reason. When this court reached (as it did reach) itself that conclusion—the effect of its doing so was of course to defeat that portion of plaintiff's demand, independently of any question of the sufficiency otherwise of plaintiff's allegations as to the nullity of the ordinances. As throwing the plaintiff out of court on the score of want of legal interest in the question would *leave still in court* its allegations that the ordinances were null, the logical result in view of that fact would have authorized us (under the pleadings) to entirely do away with a discussion of the second branch of plaintiff's petition. Be that as it may, we did in fact discuss it and held that the district judge acted correctly in refusing the injunction. In discussing the question we

took it up in the order and on the "*theory*" of plaintiff's petition, that the first branch of the case *had been examined into and passed upon adversely to plaintiff's views*, and that it was before us as one where the ordinances *being assumed legal* the rights of the parties were to be determined *on other issues*. In the very nature of things arising from a discussion from the *new* standpoint the court had to *do away with* every hypothesis and every allegation which had been urged or could have been urged on the first branch of the case and to deal with matters *as being (up to the opening of the bids) in all respects legal*. It was only on that point and from that point our discussion began on the hypothetical premises assumed, *of perfect legality in all things prior to that time*.

Taking up plaintiff's pleadings and dealing with them as applicable to the second demand we reached the conclusion that it was impossible for the district judge to have ruled otherwise than he did. In the application for rehearing filed by the plaintiff it falls into the error of seeking to *carry over* and make available for the second or "contingent" prayer, allegations which for the purposes of that prayer *have necessarily to disappear*.

For the purposes of the second branch of the case we have to "*assume*" that the Rosetta Gravel Company, the Hoskins Gravel Company and the Gunning Gravel Company were each and all *fairly* allowed to enter into free competition with each other for the paving contract under a valid ordinance, but that the Gunning Gravel Company's bid was the lowest bid of the three, and yet in spite of *that* fact and its ability to furnish all necessary security the City Council awarded the contract to the Rosetta Gravel Company and that the Mayor would sign the contract under orders from the council unless restrained by injunction. It was upon this state and condition of the pleadings and nothing more that we were called upon to say "*on the face of the papers*" whether the district judge was wrong in refusing the injunction.

The opinion which we have rendered was from that point of view.

Only a few days since in the case of Hughes vs. Murdock we cited the well recognized doctrine in pleading that up to judgment the pleadings will be taken most strongly against the pleader, and that unknown, unrecited facts would not be assumed in his favor, particularly in the face of an adverse ruling of the district judge.

The case at bar falls directly under that principle. The plaintiff

asks us to "*assume*," as an *absolutely necessary consequence of its being the lowest bidder* for the contract, that it should be awarded to it, and it asks us to assume that fact in presence of the repeated declarations of courts everywhere, that sworn officers will be *presumed to have done their duty*, certainly at least until they have been "*alleged*" to have done otherwise.

There is not one single word in plaintiff's petition accusing the Common Council of New Orleans with having acted arbitrarily, fraudulently or improperly in any manner.

The plaintiff relies upon the *naked fact* advanced by it, that its bid was the lowest, and that its material was equal or superior to that of the other bidders, and that it could furnish security. We are left absolutely in the dark as to the reasons upon which the Council acted.

We are bound in the absence of direct charges and statements of facts to presume that their action was honest and legal.

We can not eke out a case for the plaintiff by inferences of wrong-doing and make suspicions and conjectures take the place of allegations.

Whilst *it is possible there was* such wrong-doing, *it might also well be* that the Council acted after a very strict examination into all the facts and circumstances which it had the legal right to examine into in order to determine whether plaintiff's bid was a proper one or not, and that these conclusions thereon are justified and right.

It may well be that although the plaintiff "*alleges*" his ability to furnish security he may in fact never have tendered it at all, or that the security furnished was insufficient. Plaintiff's petition is silent on these points.

If the Council was guilty of wrong-doing plaintiff should have directly so alleged, and stated facts and circumstances to show in what way and from what cause that wrong-doing arose.

We repeat here what we said in the Hughes case, that when a plaintiff selects an act as the object of his attack which is not *per se* necessarily wrongful and illegal, but which may exist consistently with honesty, fair dealing and legality, it is the duty of the attacking party to set out specifically the facts which would give to the act an illegal or wrongful character.

Whatever expressions were used in our opinion to the effect that the Council had acted prudently and rightly must be read and construed from the standpoint and from the circumstances under which they

were employed. We did not intend to say as a *fact* that the Council had so acted, but that for the purposes exclusively of this case as *presently placed before us*, we were *bound to assume they had done so.*

The fear which plaintiff entertains that we have committed ourselves to holding that an arbitrary selection by a common council of three or four favored individuals to whom and to no others it would extend invitations to give in bids for contracts, or to a selection of gravel at any particular point or locality, under circumstances such as to make the bids in reality, but under disguised pretexts, nothing more or less than the bids of the particular persons owning the same, or that we have recognized and given our sanction to the doctrine that a common council under a grant to accept or reject bids has the right to arbitrarily and finally reject the lowest bid or to accept the higher, without any facts justifying such action, is totally unfounded.

There is high authority for holding to the contrary.

In the case of People ex rel. Coughlin vs. Gleason, 25 Northeastern Rep. 5, the Court of Appeals of the State of New York said:

"The claim is made on behalf of the relator that there is a conclusive presumption that the common council adjudicated that his bid was that of the lowest responsible bidder.

"If this claim is well founded, then provisions like that above quoted (providing that contracts should be let to the lowest bidder) from the city charter are of little use and they can always be effectually disregarded and violated.

"It is true that the common council, where there are several bidders, have jurisdiction to determine who is the lowest responsible bidder, but, in order to give its action any legal effect, it must exercise its jurisdiction and make a determination based upon some facts. If it refuses to accept the lowest bidder for work or supplies, there must be some facts tending to show that it is not that of a responsible bidder, or there must be at least some pretence to that effect. An arbitrary determination by such a body to accept the highest bidder without any facts justifying it can not have the effect of a judicial determination and must be denounced as a palpable violation of law."

It was doubtless the intention of the plaintiff to bring this case within the doctrine just announced, but it has not done so in its pleadings and it is by these that we are now testing matters.

Rehearing refused.

No. 11,302.

CLARA MARIE SAUTON VS. LOUISE AMELIA SAUTON.

A question of fact, whether or not the defendant is living, is only involved in this case. The testimony satisfies the court that the defendant is living, and judgment affirmed.

APPEAL from the Tenth District Court, Parish of Rapides. *Andrews, J.*

H. P. Dart and *White & Thornton* for Plaintiff and Appellee.

Robert P. Hunter for Defendant and Appellant.

The opinion of the court was delivered by

MCENERY, J. The plaintiff and defendant are sisters, and owned in indivision a cotton plantation in the parish of Rapides, containing 1000 acres. They inherited this property from their mother.

The defendant, when she was some seven years of age, was taken to the Republic of Mexico by her uncle, Edward Sauton, and his wife. She has been absent some eighteen years.

The plaintiff, alleging that her sister, the defendant, was an absentee, brought suit for a partition of the property. A *curator ad hoc* was appointed by the court to represent the absent defendant, who had no agent in the State. Experts were appointed to ascertain whether the property could be partitioned in kind.

They reported that a division in kind could not be made. The *curator ad hoc* opposed this report.

Testimony was then taken on the issue thus presented by the report of the experts appointed by the judge, and a decree rendered ordering the sale of the property. The property was advertised and sold in accordance with the decree and Benjamin Cooper purchased the same for the sum of $10,000.

The proceedings were all regular and in conformity to law. No complaint is made by the adjudicatee as to any irregularity thus far.

But when title was tendered to him and the price of the adjudication demanded, he refused to comply with his bid, whereupon the plaintiff took a rule upon him to compel him to comply with the ad-

judication. His answer to the rule is that he can not accept the title and pay the price because the co-heir and defendant, Louise Amelia Sauton, is and was dead at the time the partition proceedings was instituted, and that she had married and died, leaving issue. To sustain the allegations in his answer to the rule, he took by commission the testimony of a number of witnesses, relatives and connections of the defendant. He failed to prove by them that the defendant had ever married, or that she was dead.

On the contrary the testimony taken by commission satisfies us that the defendant is still living in the city of Guanajuato, Mexico, and that she is unmarried.

Being an absentee without an agent or representative, owning property in this State against which a right is asserted, the appointment of a *curator ad hoc* was the proper mode of proceeding to procure service on the absentee. Butler vs. Washington, 45 An. ——.

The district judge made the rule absolute; we can find no error in the decree.

Judgment affirmed.

No. 11,242.

LOUISE DESTREHAN, WIDOW OF J. H. HARVEY, VS. LOUISIANA CYPRESS LUMBER COMPANY, LIMITED.

Evidence to prove custom was properly admitted.

Custom or usage may be proved, not only to explain the meaning of terms to which is affixed a peculiar and technical meaning, but also to supply evidence of the intention of the parties regarding matters of which the contract itself affords indication, or it may be, no indication at all.

The defendant bound itself to pay tolls on all timber towed to its mill through plaintiff's canal; the measurement to be ascertained by reference to "Doyle's Rule Tables," as published in Scribner's "Lumber and Log Book," at charge of twenty cents per thousand, of inch board measure.

The contract does not indicate the method to be followed in measuring a log; whether by its "average diameter" or by taking the diameter of the small end.

Board measure is the number of feet a log will yield when sawed.

When sellers of logs and those who have a right to collect toll on them do not choose to express their intention, in the contract, as to the mode of establishing the board measure, custom and usage furnish an explanation of the unexpressed intention.

The contract contains no stipulation about deductions for hollow or peeky logs; custom was consulted to fix the amount due on board measure.

The receipt of payment of toll on logs without stipulating that toll shall be paid on the steamboat or tug by which they were towed precludes the right of collecting toll on the steamboat or tug.

Whatever an agent does within the scope of his authority is, in legal effect, the act of the principal, who is entitled to its advantages and is also subject to its liabilities.

APPEAL from the Civil District Court for the Parish of Orleans. *King, J.*

T. J. Semmes & Legendre for Plaintiff and Appellant:

The law requires that contracts should be carried out in good faith.

Custom can not be pleaded against an express contract. The contract is the law between the parties—their rights and obligations are to be determined by it. 29 An. 156; 21 An. 679; 15 An. 436.

An agent to whom is given the power of administration can not abandon or renounce a right of his principal, for the renunciation of a right is the exercise of a right of ownership. The power in such a case must be express and special. C. C. 2996; 16 L. 175; 12 R. 653; 6 R. 142; 10 M. 679.

The acts of a principal will not amount to a ratification of a contract when they are based on the representations of the agent, who was himself deceived as to the real existence of the thing which was the object of the contract. 15 An. 268.

A principal who disavows and repudiates the unauthorized acts of his agent, as soon as he is informed thereof, can not be considered as having ratified them, 22 An. 496; 24 An. 462.

A settlement is a contract. Like all contracts, it can be set aside and corrected under allegations of error and fraud. 29 An. 350; 24 An. 278; 23 An. 178.

A contract couched in clear and unambiguous terms can not be considered as meaning a different agreement than the terms used impart. 35 An. 273.

Harry H. Hall and *Sam. Henderson, Jr.*, for Defendant and Appellee.

The opinion of the court was delivered by

BREAUX, J. It is alleged that the contract between plaintiff and defendant was executed only in part and this suit was instituted to compel compliance.

The plaintiff, represented by her son and agent, Horace H. Harvey, agreed to sell a certain piece of land to the firm of Joseph Rathbone & Co., upon which they bound themselves to construct a lumber and shingle mill, with a capacity of not less than 75,000 feet, lumber measure, per day.

In this act the plaintiff agreed to lease to them other parcels of and, on terms set forth in the act, also to grant certain privileges land rights of way.

The plaintiff owns a canal extending from a point near the Mississippi river to Barataria Bay, a distance of about six miles.

The parties to whom she agreed to sell proposed to tow cypress logs to their mill, to be erected near the canal, a short distance from the river.

They promised to pay to the plaintiff a rate of tolls on all timber by them towed through the Harvey's canal, to be determined by taking the average diameter and total length of logs and ascertaining the lumber measurement of the timber by Doyle's Rule Tables (Scribner's Log and Lumber Book), at a charge of 20 cents per 1000 of inch board measure. The charges were to be 20 cents per 1000 of inch board measurement thus obtained. The parties agreed to embody all the items, clauses and other conditions of this preliminary agreement in an authentic act, to be signed by them within sixty days.

In written suggestions from an attorney, at the time, acting for plaintiff, the timber was to be measured as above stated.

In due time, after the agreement to sell had been completed, an authentic deed of sale was signed by the parties in which, for reasons not made clear, this act does not conform strictly with the preliminary agreement to sell. The purchasers bound themselves to pay to the vender tolls during a period of fifteen years from the date of the act.

No reference whatever is made to "average diameter" of logs, as set forth in the agreement to sell, also in the suggestive propositions in writing preceding the act.

In subsequent acts the defendant declared itself the successor to the rights and obligations of the partnership of J. Rathbone & Co. The mill was completed and commenced running in August, 1890. A log scaler was employed, selected by plaintiff's agent, to measure the logs, each party paying one-half of his wages. He was discharged by plaintiff in May, 1892, when she became dissatisfied with the measurement. The scaler testifies that he followed the instructions of the parties concerned, by measuring the logs at the small end and by deducting for hollow or peeky logs and by not measuring logs that would not make merchantable lumber.

In reference to the toll on the tugs, the witnesses for the defendant testify—and their testimony is not contradicted by plaintiff's witnesses—that it was stated by a representative of the plaintiff, before

signing the contract, that it was silent about charges upon defendant's boats while towing logs in the canal, and that therefore no charges could be required by plaintiff. (This testimony was admitted without objection.) It is proven that the rule of measurement followed is general and that the harbor master of another canal, in which are towed larger numbers of logs, as an officer of the State, does not charge boats towing logs on which the toll is paid.

Plaintiff, in her pleadings, complains that the logs are not measured by "Doyle's Rule Tables."

That the difference between the actual measurement and that required by the contract is equal to 40 per cent. to her prejudice.

That the defendant wrongfully deducts 10 per cent. for hollow ends.

That they measure even feet and allow no deductions for inches.

That she is entitled to tolls on all boats navigating the canal, as per her tariff of charges.

The defendant denies the correctness of plaintiff's interpretation of the contract, or of "Doyle's Rule Tables," and alleges that the scaler measured the logs under the directions of her agent, at the smaller end; that he deducted for hollow butts and rejected worthless logs.

That this method of scaling in measuring cypress logs is always followed.

That no tolls on boats towing logs were to be charged.

That during two years bills were made out monthly and plaintiff received payment.

The defendant reconvenes and prays for the execution of its contract during the unexpired term, as heretofore executed.

BILL OF EXCEPTIONS.

The record discloses several bills reserved to the admissibility of testimony, of verbal declarations preceding the written acts, and to the testimony offered to prove the custom of mill men and others in measuring timber; the action, plaintiff alleges, being upon a contract.

The questions being germane they will be taken up together.

The "parol evidence rule" assumes that parties in choosing the solemn form to express their agreement intended to fully express

their intention, removing them beyond bad faith or the treacherous tenure of "slippery memory."

As between the parties the instrument is conclusive *as to the point which it covers.* Several needful points to sustain plaintiff's contention are not covered by the act.

"It being thus ascertained as a preliminary question, that the written instrument fairly and fully represents the intent of the parties at the time of its execution, the duty of the court becomes merely one of interpretation and construction of the language employed, the object being to ascertain the expressed meaning of the parties. That meaning once ascertained is incontrovertible by any parol evidence; no new words can be added; the court can not, as is said, travel out of the four corners of the paper. But the language to be interpreted is to be read in the light of all surrounding circumstances (as the phrase is), it being obviously impossible to tell what a man has said until it is ascertained what he has *meant to say.* Any relevant evidence, therefore, which fairly *partakes of explanation,* or is reasonably calculated to place the court in the situation of the parties at the time of the execution, will, in general, be received." Best on Evidence, p. 281.

In reference to usage this commentator approvingly quotes from Phillips on Evidence: "Evidence of usage has been admitted in aid of the construction of written instruments. This evidence has been received for explaining or filling up terms." *Optimus interpres rerum usus,* p. 286.

This court has decided if a contract is silent as to quantity, parol evidence of the intention is admissible. Campbell vs. Short, 35 An. 447.

In the case before us for our decision there is a difference between the two acts, the promise to sell and the sale, in matter of ascertaining the measure.

In neither act reference is made to hollow butts, peeky logs or tolls on steamboats.

During two years the contract was executed without requiring payment for any of the items now claimed.

The purpose not being to contradict, vary or explain the written instrument, and it being obvious that the acts did not cover all the points of difference between the parties, evidence partaking of the nature of usage and evidence of explanation were admissible.

The evidence was properly admitted.

The act of the Legislature referred to by plaintiff's counsel, No. 87, of 1892, is not directly authoritative as law in this case, for it establishes a scale or rule for the measurement of pine saw logs only, and can be applied in measuring other logs than pine, not as absolutely binding, but as indicating the estimate of the law-making power.

It is almost supererogation to state that contract and stipulations must determine in measuring the full contents of logs, and in all questions relating to saps, peeky lumber and other defects, the difficulty arises from the fact that the contract is silent as to these.

Doubtless the sellers of logs who think the usage and custom too liberal and favorable to the purchaser protect themselves by special contract as to measurement.

The contract is not full and explicit; debatable questions are unavoidable.

Both parties rely upon the "Lumber and Log Book" admitted in evidence.

The plaintiff offers the context from pages 69 to 82.

The defendant objects to that on pages 70 and 71, and contends that it is not covered by "Doyle Rule Tables," made the basis for calculating the measurement of logs.

Turning to pages 70 and 71, the head lines read:

LOG TABLE, "Round logs reduced to inch board measure, by Doyle's rule," and the instructions printed on these pages are: turn to the next page for Doyle's table.

It is exceedingly difficult to determine which is Scribner's and which is Doyle's.

It is "Scribner's Lumber and Log Book."

His preface informs us that his original tables and those of Doyle were carefully examined and revised, and that the Doyle Log Tables have been considerably extended.

Conceding that the instructions headed as above stated are Doyle's, it does not follow, in adopting "Doyle's Rule Tables" as a basis of the measurement, that it includes the instructions or explanatory notes.

To illustrate: preceding Scribner's tables, which form part of the book in evidence, there are directions and notes.

They are not part of the tables.

If the logarithms of Napier, as embodied by Prof. Loomis in his works, were agreed upon to abridge mathematical calculations, the agreement would not include explanatory or illustrative observations, particularly if it were not known whether they were by the former or the latter.

Moreover the plaintiff, in the preliminary agreement, stipulated that the measurement should be made by calculating the average diameter of the logs.

In the deed of sale the "average diameter" is omitted.

A right, well defined, was abandoned.

The rule of interpretation of authentic acts is the same as that of statutes.

It is a well settled rule of interpretation that when any statute is revised or one act framed from another, some parts being omitted, the parts omitted are not to be revived by construction. 1 Pick. (Mass.) 45; 9 Pick. (Mass.) 104.

"It is decisive of an intention to prescribe the provisions mentioned in the latter act, as the only one on that subject which shall be obligatory." 20 Wall., U. S.

It was expressly stipulated in the act of promise to sell to insert "average diameter' in establishing the measure of logs.

The words are omitted in the act in which it was agreed to insert them.

They are not to be revived by construction.

The plaintiff claims an amount on account of the 10 per cent. deduction on hollow or peeky logs, and for defective logs that would not make merchantable lumber, not measured.

Every witness, those for the plaintiff and those for the defendant, testify that the custom of log inspection of cypress timber, in round logs, when hollow or peeky, ten feet off length of logs shall be allowed and deducted as compensation for the defect, and that logs so defective that they will not produce merchantable lumber are not measured.

Counsel for the plaintiff does not question the correctness of the testimony proving custom.

They contend that the contract must be executed as written.

That the intention of the parties is determinable without regard to custom.

This is correct if the contract bears out the contention that the intention of the parties is expressed.

No reference is made in the contract to defective logs, but contains the following:

"At a charge of 20 cents per 1000 of inch board measure thus obtained" from the logs.

BOARD MEASURE.

There is no possibility of determining the "board measure" of each log without reference to rules of measurement established by custom. The act contains no statement upon the subject.

Both as relates to the "average diameter" and to defective logs, the parties not having agreed, custom must be consulted in determining the number of boards each log will yield. If "board measure" had been omitted from the contract, the question would arise as to the actual dimensions of a round log, without allowing for saw kerfs, worthless saps, crooked or otherwise defective logs; but "board measure" being inserted in the act, it must be determined by reference to custom, and the actual quantity of lumber must be ascertained which a log will produce under the manipulation of a competent sawyer.

We understand board measure to be the number of feet of board which a log will produce when sawed.

The contract, the interpretation of which is involved in this suit, was executed without objection.

The agent of the plaintiff had charge of her interest under it, and the logs were towed through the canal, were measured and sawed into lumber.

Monthly settlements were made.

He had a log scaler of his own selection.

He conferred with the representatives of defendant as to the rules which should govern in measurement. They were followed. The plaintiff has not established error entitling her to relief. She is bound by the acts of her agent, acting within the scope of his authority. The settlements are final; it is not proven that they were made by the agent in ignorance of the facts. As a general rule the knowledge of the agent is the knowledge of the principal. Seixas vs. Citizens Bank, 38 An. 435.

"Whatever an agent does, within the scope of his authority, is, in legal effect, the act of his principal, who is entitled to its advantages

and is also subject to its liabilities." Waite A. and D., Vol. 1, p. 220. His duty was to attend to plaintiff's interests under the contract. The supervision of the measurement of the logs was part of his duty. The plaintiff, after such a time, can not be heard to question the correctness of the payments on the ground that she was not aware of the rule followed in the measurement.

TOLL ON BOATS.

Plaintiff claims toll upon tugs or other vessels employed solely in towing logs under the contract. Having fixed a toll, and there being no stipulation for extra charges, it includes the logs and the power towing them.

The testimony proves that in matter of toll in other canals no extra charge is exacted from the steamboat towing logs upon which toll is paid.

EVEN MEASURE.

In reference to measuring the lumber in even length, the judgment appealed from is silent. In board measure, it is stated in evidence, even length only is taken and odd ends are thrown away as worthless. The contract, we have seen, provides for board measure.

Our views coincide with those of the judge of the District Court in reference to the issues involved.

Judgment affirmed at appellant's costs.

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No. 11,274.

STATE OF LOUISIANA VS. ARTHUR WEST.

1. Evidence that a person other than defendant confessed that he himself committed the crime is inadmissible, it being hearsay and irrelevant. State vs. West, 45 An. (La.); Gray's Case, Ir. Cir. Rep. 76; Welsh vs. State (Ala.), 11 South 451; 30 Pac. 7
2. Objections can not be brought before this court through bills of exceptions taken for the first time on a motion for a new trial which should have been reserved during the progress of the trial itself.
3. A verdict of "Guilty with mercy of the court" will be held to be one of "Guilty of manslaughter" in a case where the accused, having been indicted for murder and convicted of manslaughter, had succeeded in having the verdict and sentence set aside and was placed on trial a second time under the original indictment, but with an announcement from the district attorney and a charge

from the court that the prisoner was only on trial for manslaughter. Accused will not be listened to in claiming (for the purpose of setting aside the verdict) that the verdict was one of "guilty of murder" and therefore not responsive to the charge actually advanced by the State.

4. The presence of the defendant in court is not essential either on the trial of a motion for a new trial or one in arrest of judgment. The fact that on the trial of the motion for a new trial testimony is taken on behalf of defendant does not alter the case. There may be instances where counsel might desire the attendance of the client. In such cases counsel should so suggest to the court.

APPEAL from the Eighteenth District Court, Parish of Lafourche. *Caillouet, J.*

M. J. Cunningham, Attorney General, for the State, Appellee.

Beattie & Beattie, for Defendant and Appellant.

The opinion of the court was delivered by

NICHOLLS, C. J. The defendant was indicted for the murder of Thomas Lyall at the September term, in 1892, of the District Court for Lafourche. He was tried, found guilty of manslaughter and sentenced to the penitentiary for one year.

He appealed to this court. On appeal the verdict of the jury and the judgment of the court thereon were set aside and the case remanded. State vs. West, *ante*, page 15.

He was tried a second time and again sentenced to hard labor in the State penitentiary at Baton Rouge for the term of one year.

From this judgment he has appealed, relying upon objections urged in three bills of exception, a motion in arrest of judgment and an assignment of error. The first two bills cover the same ground, and are to the refusal of the district judge to allow certain testimony to be taken, the object of which the bills declare was to show that one James Baptiste had been suspected of killing Thomas Lyall; that he had been arrested upon a warrant issued on an affidavit made against him; that he had resisted arrest, saying he would not be arrested and sent to the penitentiary for the said killing, and other things admitting the killing; that in resisting arrest the said Baptiste was shot and afterward died from the wounds so received and that it was only after the death of the said Baptiste that the defendant West was arrested for the murder of said Lyall. The objection

urged by the State and sustained by the court to the introduction of this testimony was that it was irrelevant and hearsay.

Testimony of this character was by this court declared to be inadmissible when the case was first before us, as being hearsay. Defendant on the last trial offered it as *rem ipsam*. In his brief it is said: "The object of it was not to prove the truth of the statements made by Baptiste, but to prove the fact of his having made them to show the jury his belief and opinion as to the party who fired the shot that killed Lyall, and consequently to raise and substantiate any doubts in their minds as to the guilt of the defendant."

We think the ruling of the court was correct. The testimony was irrelevant.

In Welsh vs. State, an Alabama case reported in 11 Southern Reporter, p. 451, the court said: "The proposed testimony of the witness, Warren Lancaster, to the effect or which would have tended to show that one Lee Lancaster had admitted or confessed to the witness that he (Lee Lancaster) killed Will Welsh, for whose murder defendant was being tried, was the merest hearsay, wholly irrelevant and incompetent, and the court properly excluded it from the jury. 3 Brick Dig., p. 287, Sec. 592; State vs. Duncan, 6 Ired. 236; State vs. Haynes, 71 N. C. 79.

In People vs. Hall (Cal.), 30 Pacific, 7, defendant and one Kingsbury were arrested for an alleged burglary at the same time and place and by the same persons, and while under arrest they attempted to escape and were fired upon by their captors.

A physician was sent for to treat their wounds and Kingsbury died from the effects of his wounds before any complaint was filed against either of the parties. In his own behalf defendant offered to prove that Kingsbury's wounds were necessarily fatal, and that he so informed him at the time; that Kingsbury admitted to the physician that he fully realized he was mortally wounded, was on the point of death and had given up all hope of getting well.

That he was conscious of death, and that thus having a sense of impending death and without hope of reward he made a full, free and complete confession to said physician in relation to this alleged crime, stating that he himself had planned the entire scheme, and that Hall had nothing to do with it and was not connected with the guilt and was in all respects innocent of any criminal act or intent in the matter.

This evidence was objected to and excluded. Reciting these facts the Supreme Court said: "The rule is settled beyond controversy that in a prosecution for crime the declaration of another person that he committed the crime is not admissible. Proof of such declaration is mere hearsay evidence and is always excluded whether the person making them be dead or not." Citing Wharton Crim. Ev. (9th Ed.), Sec. 225; Greenfield vs. People, 85 N. Y. 75; Snow vs. State, 58 Ala. 372; Lyon vs. State, 22 Ga. 400; Kelly vs. State, 82 Ga. 444; 9 S. E. 171.

Stephen in his Digest of the Law of Evidence, Art. 22, refers to Gray's Case, Irish Circuit Reports, page 76, as sustaining the same position, and that such evidence was irrelevant.

The third bill is to the action of the court in overruling a motion for a new trial made by the defendant—on the ground "that the verdict of the jury was contrary to the law and the evidence, and that it was rendered in opposition to the law in such cases made and provided, and in opposition to the charge as to the law laid down by the judge, and that a continuance applied for by the district attorney and granted by the court was unadvisably and illegally granted for certain reasons.

"The statement of the court appended to this bill is that the new trial was refused because it was of opinion that there was no error in the order granting the continuance, and because even if there had been error no exception was taken at the time to the ruling of the court, but on the contrary the accused, through his counsel, consented to go to trial and did go to trial under an agreement to use the testimony of the absent witnesses of the State taken before the committing magistrate in the presence of the accused. The court considered that the verdict of the jury was responsive to the charge of the court—the court having distinctly instructed them that the accused was on his trial and could only be tried for manslaughter—that that was the only charge against him and that the only verdict they could find against him was one of guilty or not guilty as the case might be."

Where, during the progress of a trial under the rules of practice, objections are to be raised and bills of exception reserved as occurrences take place by which a party conceives himself to be aggrieved, and he fails to make such objections and reserve such bills, he can not after verdict for the first time raise such objections and through

bills of exception then taken hold the position which he would have done originally—the lost ground can not be regained.

The record bears the court out in its statements—and his ruling was correct. Defendant moved *to arrest the judgment* for the reason that the verdict is illegal on the face of the record and is in nowise responsive to the matters at issue herein, in that the verdict is *written upon an indictment* for murder and finds respondent "guilty at the mercy of the court," when in truth and in fact your respondent was simply on trial on a charge of manslaughter, he having been hitherto acquitted of the charge of murder found and contained in the indictment found against him and on which the present verdict is written. The court overruled this motion and sentenced defendant to one year's imprisonment, as has been stated.

Defendant says of this motion, "it is based on the ground that the verdict of guilty, with the mercy of the court, is the verdict found against the accused on the last trial and that this verdict is written upon an indictment for murder, thus *appearing* to convict the accused unqualifiedly of murder, when, in point of fact, having been once tried under the same indictment and found guilty of manslaughter, he could only have been tried for and found guilty of manslaughter."

"True it is that the judge charged the jury that they could find him guilty of only manslaughter, and true it is that some days previous to the trial there is an entry upon the minutes in which it is stated the accused would be tried only for the crime of manslaughter. But the jury in this case had no reason to know of such entry, and looking at the verdict as it is written it is evident that the jury were heedless of the charge of the judge."

We do not understand defendant's counsel to claim that, when this case was remanded by us to the lower court for a new trial, it was necessary for the State to frame a new indictment for manslaughter against the defendant, and arraign and try him upon that indictment. We understand him to recognize that he was properly tried under the original indictment and arraignment, and that the effect of the first verdict was at most to entitle him under the *indictment for murder* to be *tried* for *manslaughter*, and to only contend that when the jury returned into court with a verdict it should have been specifically "guilty of *manslaughter*," and not "*guilty*," which he claims is the verdict under the indictment for *murder*.

On the 8th of March, 1893, we find the following minute entry:

"STATE OF LOUISIANA
vs.
"ARTHUR WEST. } No. 1232. Indictment for Murder.

"The accused, Arthur West, being present in court, and represented by his counsel, Beattie & Beattie, Esqs.

"On motion of the district attorney and by consent the court ordered that the trial of this cause be fixed for Monday, March 13, 1893.

"The district attorney stating in open court that he would try the accused on the original indictment for murder, but only on the charge of manslaughter."

In opening his charge the district judge used this language:

"The accused is on trial for the manslaughter of Thomas Lyall. An inspection of the indictment shows that he was originally charged with murder, but on a former trial he was acquitted of that crime, and he is now only charged with manslaughter, and can only be tried for that crime."

Having made this statement he, throughout the whole of the balance of the charge, confined himself to instructing them on the law of manslaughter.

Defendant's counsel concedes that he was on trial for manslaughter; the district attorney at no time took position otherwise; the district judge in his charge so advised the jury, and in his sentence has acted on that fact as unquestionable. The jury was thoroughly informed of the issue it had to pass on, and its verdict can not reasonably be held to apply to any other than that submitted to it. No one but the defendant himself insists that he was convicted of murder. He can not successfully take such a position to set aside the verdict. There is no significance in the fact that the verdict was written upon the indictment. No one could misunderstand its purport.

It could have been returned orally and in the same words—its meaning was not changed from what it would have been had it been so rendered.

Defendant assigns as error "that during the trial of the motion for a new trial, wherein testimony was adduced for and against him, he was not in court but was confined in the parish prison, and was thus refused the privilege of being confronted with the witnesses, in violation of Art. 8 of the Constitution of the State; and further, that

upon the trial of the motion in arrest of judgment he was not present in court, but was confined in the parish prison."

The record shows that testimony on behalf of the defendant was taken on the motion for a new trial, but no witnesses for the State appear to have been placed on the stand.

We do not think that any constitutional provision was violated by defendant's absence at that time.

This court has on several occasions declared that the presence of the accused on the occasion of trials of motions for a new trial and in arrest of judgment was not essential.

Defendant finds in the fact that on the trial in this case of the motion for a new trial testimony was taken, a reason for making a distinction between it and the cases cited. It is true that there may be instances where the attorney of an accused might desire the presence of his client, but such cases happening it would be a very simple matter for him to make a suggestion to that effect to the court. A request to have the defendant brought into court would certainly not be denied.

In State vs. Simien, 36 An. 924, where the accused claimed he was entitled to be present on the trial of a motion on his behalf for a continuance, at which it was asserted testimony was taken, the court said: "The transcript fails to show that any testimony was taken on the day mentioned on an application for an attachment for a witness. *Even had it been shown*—and the prisoner was absent at the time—it was a proceeding of that character that his presence thereat was not essential;" citing State vs. Clark, 32 An. 538, and State vs. Somnier, 33 An. 237.

We see nothing in the record which would go to show that the prisoner was REFUSED the privilege of being present. Had he asked to be present there is no ground for assuming he would have been met with a refusal.

For the reasons herein assigned it is hereby ordered, adjudged and decreed that the judgment appealed from be and the same is hereby Affirmed.

No. 11,248.

M. G. HUGHES VS. MYRA C. MURDOCK ET AL.

[REPORTED BY SYLLABUS ONLY.]

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When, by subsequent order of court, imperfections in a transcript are cured, a pending motion to dismiss will be overruled as matter of course.

A plaintiff who attacks an act not *per se* wrongful, but which may be perfectly consistent with good faith and fair dealing, must aver and specify the facts giving to it a different character.

Up to judgment the pleadings are taken most strongly against the pleader, and unknown, unrecited facts are not assumed in his favor.

The Legislature of a State, unlike Congress, which can not do anything which the Federal Constitution does not authorize, may do everything which the State Constitution does not prohibit, and constitutional prohibitions are not enlarged by construction beyond their terms.

Article 113 of the Constitution of 1868 prohibiting the adoption of children by special legislative act does not prohibit legitimation by such an act; the two subjects are separate and distinct.

No one can be said to have any vested right in any existing legal capacity in reference to any future contract or advantage to result from that capacity. He who to-day is by law a forced heir in expectancy may to-morrow by a new law be declared liable to be disinherited by will or incapable even of succeeding *ab intestato*. It may be assumed as a general rule that the mere capacity or incapacity of particular classes of persons to contract or to inherit depends upon the legislative will.

ON MOTION TO DISMISS APPEAL.

The opinion of the court was delivered by WATKINS, J.

ON THE MERITS.

The opinion of the court was delivered by NICHOLLS, C. J.

APPEAL from the Civil District Court for the Parish of Orleans. *Monroe, J.*

James Wilkinson for Plaintiff and Appellant.

J. P. Blair for Defendants and Appellees.

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No. 11,263.

THE STATE OF LOUISIANA VS. EMMA WILLIAMS.

1. The plea of *autrefois acquit* involves questions of mixed law and fact, and, when not demurrable on its face, is properly referred to a jury.
2. The test whether the plea of *autrefois acquit* is a sufficient bar is whether the evidence necessary to support the second indictment would have sustained a legal conviction on the first.
3. Under the application of this test it has been constantly held that acquittal under an indictment for larceny of goods alleged to belong to A is no bar to subsequent indictment for larceny of the same goods alleged to be the property of B, where it is shown that the first acquittal was due to the misnomer in the allegation of ownership. The second jeopardy was not for the "same offence," and the evidence essential to sustain the second charge would necessarily have been fatal to the first. The authorities to this effect are so numerous and concordant that we feel bound to follow them.
4. Our law is liberal in allowing amendments of misnomers in indictments, and it would be better practice for the State to avail itself of such privilege, but as it is not required as a duty, the failure to amend does not forfeit any legal right of the State.
5. Absence of counsel for the prisoner, when the case is regularly called for trial, is no bar to proceeding when the prisoner expresses his readiness and consent thereto, and this furnishes no legal ground for new trial.

APPEAL from the Criminal District Court for the Parish of Orleans. *Moise, J.*

M. J. Cunningham, Attorney General, and *Lionel Adams*, for the State, Appellee.

W. L. Thompson for Defendant and Appellant.

The opinion of the court was delivered by

FENNER, J. The defendant, being prosecuted for grand larceny of certain goods of the property of Harry H. Waters, filed a plea of *autrefois acquit* based upon a former information, trial and acquittal for grand larceny of the same goods at the same time and place. The identity of the particular acts involved under the two informations is not disputed, but the first record exhibits an information for larceny of goods alleged to be "the goods and chattels of one Louise Waters."

At the suggestion of the district attorney the court referred the issue of *autrefois acquit* to a jury, to which ruling defendant objected and excepted.

There is no merit in this exception. The judge's course was proper under all authorities. State ex rel. Voorhies vs. Judge, 42 An. 414; 1 Bish. Cr. Prac., Secs. 812, 816; Whart. Cr. P. and P., Sec. 480; Archbold Cr. P. and P., pp. 369, 371.

The issue went to the jury, which was instructed by the court that "if they find as a fact that the prisoner was acquitted under the first information because of a misnomer in the allegation of ownership, such acquittal would not be a bar to a second prosecution, wherein the ownership of the property alleged to be stolen was laid in another and different person."

To this instruction the defendant excepted, and as it involves the whole merits of the plea of *autrefois acquit*, it may be considered together with the motion in arrest afterward filed.

The jury, after hearing evidence and argument, returned a verdict rejecting the plea.

We have not reached our conclusion on the question involved in this plea without grave consideration and some doubt as to what might be our opinion if the question were *res nova;* but we find such a *consensus* of authority on the subject that we think it safest to follow it.

The precise question has not been heretofore presented in this State, but we have, on germane questions, frequently recognized the rule that "the test whether the plea of *autrefois acquit* is a sufficient bar in any particular case is whether the evidence necessary to support the second indictment would have been sufficient to have procured a legal conviction on the first." State vs. Kehoe, 13 An. 243, 244; see, also, State vs. Vines, 34 An. 1079; State vs. Helveston, 38 An. 314; State vs. Faulkner, 39 An. 811.

And it is under the application of this rule that it has been constantly held that acquittal under an indictment for larceny which laid the property of the goods in the wrong person was no bar to a subsequent prosecution under an indictment stating the goods to be the property of the legal owner, for the reason that in either case it was essential to prove the property of the goods as laid in the indictment, and that evidence showing the goods to be the property of A under the last indictment would not have supported a conviction under the first indictment for stealing the goods of B, but would have been necessarily fatal to it. State vs. Risher, 1 Rich. (S. C.) Rep., p. 219; State vs. Revels, 1 Busbee (N. C.), p. 200;

State vs. Birmingham, Ib., p. 120; Morgan vs. State, 34 Texas, 677; Rex vs. Green, 7 Cox Cr. C. 186; R. vs. Henderson, 1 Car & March, 328.

There are numerous cases strictly analogous, in which the same principle has been applied. Pennsylvania vs. Huffman Addison, p. 14; Com. vs. Mortimer, 2 Va. Cases, 325; Com. vs. Wade, 17 Pick. 395; People vs. Warren, 1 Parker C. C. 338; Hite vs. State, 9 Yerger, 357; Rex vs. Cogan, 1 Leach, 448. See also Arch. Cr. P. and P., p. 364; 1 Whart. Cr. L., Secs. 556, 557; 1 Bishop Cr. L., Sec. 1052.

The provision of our Constitution that no person shall "be twice put in jeopardy for the same offence" does not differ from the like provision contained in the Constitution of the United States and of the other States of this Union. They all agree that to entitle the party to its benefits the second jeopardy must be for the "same offence." The principle on which the numerous authorities quoted rest is that the charge of stealing goods, the property of A, is not the "same offence" with a charge of stealing goods the property of B, and that the evidence essential to support the one charge would necessarily destroy the other. While our law grants great latitude of amendment in cases of misnomer, and while it would be better practice in such cases for the State to avail itself of this privilege, the law does not make it a duty and we can not enforce it as such.

We have considered the cases of State vs. Ware, 44 An. 594; State vs. Harris, 42 An. 980; State vs. Hanks, 39 An. 235, and State vs. Everage, 33 An. 120, but they do not bear on this case. The two first and the last dealt with questions of disputed ownership, in which the ownership, as laid in the indictment, was held sufficient to sustain it under the proof; and the other was a case in which, on discovery of error in the ownership as laid, the indictment was duly amended. But no decision has ever held that an indictment for larceny of goods the property of A could be sustained by proof of larceny of goods the property of B, in absence of timely amendment. This is the principle on which the decisions rejecting the plea of *autrefois acquit* in such cases rest, and as the courts and text-writers are in accord, and no suggestion to the contrary by any authority whatever is referred to or can be found by us after diligent search, we are not disposed to break the force of unanimous precedents and to isolate our own jurisprudence on such a question.

The jury was properly instructed by the judge, and having heard evidence and found, as a fact, that "the prisoner was acquitted under the first information because of the misnomer in the allegation of ownership," we must accept that conclusion as final and as bringing the case within the strictest application of the authorities.

These views cover all points in the case except the refusal of the motion for new trial based on the allegation that "defendant was forced to go to trial without the presence or assistance of her counsel." The statement of the judge shows that the case had been regularly fixed with full notice to defendant and her counsel; that the counsel had left the court room before the case was called up, without leaving any word with any person; that the judge ordered a fruitless search for him in the building and on the adjacent streets; that he then asked the defendant if she was willing for the trial to go on and she replied that she was, and that the trial accordingly proceeded.

There is no reversible error in the judge's action. The case is stronger against the defendant than that of State vs. Walker, 39 An. 20, where we said: "This court has repeatedly held that when accused has no counsel, or when his counsel is absent, and when he makes no application for assignment of counsel or for continuance on any ground, but goes to trial without objection, the judge commits no error in permitting the trial to proceed, and after conviction defendant can not assign such defects as legal ground for new trial. 25 An. 381; 36 An. 91; 37 An. 606; 36 An. 923."

Judgment affirmed.

No. 11,275.

THE STATE OF LOUISIANA VS. JOSEPH BLANCHARD.

This court has no appellate jurisdiction in a criminal case in which a fine exceeding $300 has not been "actually imposed," and in which the punishment of death or imprisonment at hard labor could not be inflicted.

APPEAL from the Eighteenth District Court, Parish of Lafourche. *Caillouet, J.*

M. J. Cunningham, Attorney General, for the State, Appellant.

Beattie & Beattie for Defendant and Appellee.

The opinion of the court was delivered by

FENNER, J. The defendant is prosecuted for an offence denounced by Acts Nos. 5 and 62 of 1892, the penalty for which as prescribed by the law is that, if convicted, he "shall be fined not exceeding $500 or imprisoned not exceeding sixty days, or both, at the discretion of the court." He filed a motion to quash the indictment, which was maintained by the judge, and from that judgment the State has appealed.

A motion is made to dismiss the appeal on the ground that the case is not within the appellate jurisdiction of this court. The Constitution, Art. 81, confines our jurisdiction in criminal cases to "criminal cases on questions of law alone, whenever the punishment of death or imprisonment at hard labor *may be* inflicted or a fine exceeding $300 *is actually imposed.*"

Obviously the test of our jurisdiction depends on affirmative answer to one of two questions, viz.: 1. Is the case one in which the punishment of death or imprisonment at hard labor may be inflicted? 2. Is it a case in which a fine exceeding $300 has been actually imposed?

The only possible answer in this case to both questions is a negative, and that is fatal to the appeal, as we have twice recently decided in cases identical with this. State vs. J. M. Smith, 39 An. 231; State vs. B. F. Smith, Id. 320.

Appeal dismissed.

No. 11,239.

DR. JAMES RIGNEY VS. DR. GEO. N. MONETTE.

1. Although plaintiff and defendant were both residents of the same parish at the inception of the suit, yet if plaintiff subsequently removes to a different parish the defendant having a cause of action against him is not compelled to follow him at his new domicil, but under Art. 375, C. P., may bring his demand by way of reconvention in the original suit, provided, at least, he does not thereby retard or delay the progress of plaintiff's action.
2. The object of the proviso to C. P. 375 is to secure a common forum for the settlement of controversies between the same parties, and to dispense a defendant who has been impleaded in the court of his domicil from the necessity of seeking his adversary in a different forum in order to propound an action against him.
3. The question as to the forum in which the reconventional demand may be urged depends on the conditions existing at the time when it is filed.

Rigney vs. Monette.

APPEAL from the Civil District Court for the Parish of Orleans. *Théard, J.*

W. S. Parkerson for Plaintiff and Appellee.

Merrick & Merrick for Defendant and Appellant.

The opinion of the court was delivered by

FENNER, J. Plaintiff filed this suit, claiming damages for violation of a contract of sale of defendant's professional practice and good will in the city of New Orleans, on February 5, 1891.

On February 27, 1891, defendant filed an answer of general and special denials. No further proceedings were taken until February 1, 1892, when defendant filed a supplemental answer containing a reconventional demand. The latter set forth a claim for damages for malicious prosecution and arrest, and alleged that the plaintiff resided out of the parish of Orleans.

So matters stood for nearly a year, when, on January 6, 1893, plaintiff filed a rule on defendant to show cause why the supplemental answer and reconvention should not be stricken from the record on the ground that it "changed the nature of the defence from an action *ex contractu* to an action *ex delicto*, and that the same is not permissible in law."

No action was taken on this rule until February 2, 1893, when, the cause being set for trial before a jury which had been empaneled, the rule was argued and submitted to the judge, who made the same absolute, to which the defendant reserved his bill of exceptions.

The case, thus shorn of the reconventional demand, went to trial before the jury, resulting in a verdict and judgment against defendant for $500, from which the latter has appealed.

We think the judge erred in striking out the reconventional demand. Although both plaintiff and defendant resided, at the date of institution of the original suit, in the city of New Orleans, it is admitted that the plaintiff subsequently removed to the parish of Pointe Coupee and was residing there at the time when the reconventional demand was filed, and so remained when the case was tried.

Art. 375 of the Code of Practice, after defining the nature of demands which may be pleaded in reconvention and declaring that

they must be "necessarily connected with and incidental to the main action," proceeds to establish the following exception: "Provided, that when the plaintiff resides out of the State, or in the State, but in a different parish from the defendant, said defendant may institute a demand in reconvention against him for any cause, although such demand be not necessarily connected with or incidental to the main cause of action."

The obvious purpose of the proviso is to establish a common forum for the settlement of legal controversies between the same parties of whatever nature, and to dispense a defendant who has been impleaded in the court of his domicil, from the necessity of seeking his adversary in a different forum in order to propound a coexistent cause of action against him.

Counsel for plaintiff contends that the right to file such a demand in reconvention must be determined according to the conditions existing at the inception of the suit, and that, as both parties then resided in New Orleans, such an independent demand could never be filed in that suit.

As we look at it, the question of the forum must depend on the conditions existing at the time when the demand is filed. That is certainly the ordinary rule. Defendant, desirous of bringing suit on a demand against the plaintiff, found that the latter, though still prosecuting his own suit against defendant at the latter's domicil, had himself withdrawn to a different jurisdiction, and the question presented was whether he was bound to follow him there, or whether, under Art. 475, C. P., he could compel him to answer in the forum which he had himself invoked. Defendant then found himself sued by a plaintiff who resided "in a different parish from defendant," and, in that case, the law expressly authorized him "to institute a demand in reconvention against him for any cause," and to have their differences settled at one time and by the same court. The parties stood in the precise case for which the law provided and all the reasons underlying its precept were fully applicable. Suppose the plaintiff had removed to a different State, would the defendant have been bound to follow him there, because at the inception of his suit he resided here? We think not; and the law making no difference between residence in a different State and residence in a different parish, we can make none. The mere fact that defendant's cause of action arose after the institution of plaintiff's suit seems to

us of no moment. His right existed at the time when he filed his reconventional demand and the only question was as to his right to prosecute it in the forum in which plaintiff was suing him. There is no complaint of the tardiness of his demand or that it delayed or interfered with the progress of plaintiff's suit. On the contrary, the reconventional demand rested in court for eleven months before the trial of the case and before even the motion to strike it out was made. We can see no possible reason under such circumstances why the counter-claims between the parties should not have been tried and decided together. The defendant had the right to such a trial, and without considering the merits of the verdict and judgment we think justice requires that the case should be restored to the *status quo* before trial, and that all the issues should be heard and determined together.

It is therefore adjudged and decreed that the verdict and judgment appealed from be avoided and reversed, that the defendant's supplemental answer and reconventional demand be reinstated and the case be remanded to the lower court for further proceedings according to law, appellee to pay cost of appeal.

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No. 11,289.

THE STATE EX REL. D. J. REID VS. G. A. FOURNET, JUDGE.

1. Prohibition is not a writ of right, and in cases where the jurisdiction is even doubtful, it is not readily granted when there exists an adequate remedy by appeal.
2. The *nature* of a cause of action is not to be confounded with its *sufficiency*. The *nature* of the action determines jurisdiction and when that sustains the jurisdiction the latter can not be defeated by mere insufficiency of the allegations or of the proofs.
3. The petition in this case alleges acts committed under the present as well as under the former terms of relator in office; and even if the latter were open to relator's exception (on which we express no opinion), that would only eliminate them from the petition, without abating or defeating the action.
4. If the respondent judge has committed error in overruling relator's exception, that error does not lie in maintaining jurisdiction, but in sustaining a partially insufficient cause of action; and for such error the only appropriate relief would be by appeal.

APPLICATION for *Certiorari* and *Prohibition*.

Clegg & Thorpe, *Wm. Schwing* and *E. N. Pugh* for the Relator.

E. D. Miller, District Attorney, *D. B. Gorham* and *R. P. O'Bryan* for Respondents.

F. C. Zacharie, Amicus Curiæ.

The opinion of the court was delivered by

FENNER, J. Art. 196 of the State Constitution provides:

"The Governor, Lieutenant Governor, Secretary of State, Auditor, Treasurer, Attorney General, Superintendent of Public Education, and the judges of all the courts of record in this State, shall be liable to impeachment for high crimes and misdemeanor, for non-feasance or malfeasance in offices, for incompetency, for corruption, favoritism, extortion or oppression in office, or for gross misconduct, or habitual drunkenness."

Art. 201 provides that "For any of the causes enumerated in Art. 196, district attorneys, clerks of court, sheriffs, etc., shall be removed by judgment of the District Court of the domicil of such officer; and it shall be the duty of the district attorney to institute suit in the manner directed by Art. 200, on the written request and information of twenty-five resident citizens and tax-payers * * * In all such cases the defendant, the State, and the citizens and tax-payers, * * * or any one of them, shall have the right to appeal, both on the law and the facts, from the judgment of the court."

In full conformity with these provisions a suit was filed in the District Court of defendant's domicil, presided over by the respondent judge, to remove him from office as sheriff and *ex-officio* tax collector of the parish of Calcasieu.

The petition set forth that the relator had been thrice elected to said office for successive terms, having been elected for his present term in April, 1892.

The petition alleges that "during his incumbency for former terms, and during his present term of office, the said Reid has been guilty, both as sheriff and as tax collector, of repeated acts of non-feasance and malfeasance, and incompetency and corruption, and favoritism and extortion and oppression in office, and of gross misconduct." The petition then proceeds to set forth various specific acts done by him as sheriff. It then further alleges that "as tax collector said Reid has been guilty of many and repeated acts of non-feasance, malfeasance, corruption, favoritism, incompetency, extortion and

gross misconduct, said acts extending through the former years of his said incumbency down to and including his present term of office;" and it sets forth various specific acts in support thereof.

Most of the specific acts set out are laid as dating under his prior terms of office; but at least two are not so laid, but may well have occurred during his present term, viz., the charge of not keeping correct cash books as required by law, and the charge of gross misconduct and oppression based on his arrest of members of a committee of the police jury appointed to investigate his accounts, which is simply averred to have occurred in 1892.

The petition concludes with the following allegation: "Your petitioner therefore avers that considering the many acts of extortion, favoritism and corruption as detailed in the foregoing, and his wanton disregard of the laws enacted for his guidance and for the protection of the citizens, the said D. J. Reid should be removed from his said office;" and it concludes with a prayer for that relief.

The defendant appeared and filed a plea or exception to the following effect, viz., "that the petition charges him with acts of commission and omission, alleging them to have been done or omitted prior to the commencement of his present term of office * * * and this defendant shows that this court has no right, authority or power under the law to inquire in this suit into said acts laid as of dates anterior to his said present term of office or by reason thereof adjudge him to be removed from his said present office; and further, that the petition aforesaid shows no cause of action; wherefore defendant prays that as to all such alleged acts of commission and omission charged in said petition as of dates prior to the commencement of defendant's present term of office, this suit be dismissed at plaintiff's cost."

Subseqently, and after the exception had been submitted, the plaintiffs filed an amended petition, setting forth sundry additional charges, based on acts done during the defendant's current term of office.

The exception or plea in bar was thereafter decided by the judge, who overruled the same.

The defendant thereupon filed the present application for writs of certiorari and prohibition, alleging, substantially, that the grant of power to the judiciary to remove elective officers is limited to the cases provided in the articles of the Constitution; that said cases only

refer to and embrace acts committed by an officer during the term of office from which he is to be removed; that outside of these cases courts have no power or jurisdiction, *ratione materiæ*, to entertain suits for removal; that, therefore, in overruling his exception and in assuming jurisdiction over the suit in question the district judge transcends his authority and is guilty of usurpation, and that his proceedings therein would be *coram non judice* and void, and would inflict on relator an irreparable injury.

The respondent judge files answer maintaining his jurisdiction and denying relator's title to the relief sought.

After much reflection we have come to the conclusion that the case presented by relator does not successfully impugn the jurisdiction of respondent's court over the cause in which his action is arraigned.

The Constitution undoubtedly confers upon that court the power to entertain an action for the removal of relator from office for any of the causes enumerated in Art. 196. No other court has authority to entertain such an action. The quotations which we have made from the petition show, beyond question, that the action brought against relator was an action to remove him for the very causes enumerated in Art. 196. It is specifically and repeatedly alleged that he has been guilty of "acts of non-feasance, malfeasance, incompetency, corruption, favoritism, extortion and oppression in office, and gross misconduct," and these are the very causes enumerated in Art. 196. To say that the court had not jurisdiction over such an action is simply to disregard the express authority conferred by the Constitution.

These allegations alone, taken in connection with the prayer of the petition, establish and fix the jurisdiction of the court. If the petition contained no other allegations and had set forth no specific facts whatever, its deficiency in that respect would give rise to no question of jurisdiction, but simply to an exception of vagueness and insufficiency. So if the specific acts charged are not such as, if proved, would sustain the action, this also would not raise a question of jurisdiction, but would only authorize an exception of no cause of action, and that is really the substantial character of relator's exception in the court below. The *nature* and the *sufficiency* of a cause of action are not to be confounded. The *nature* of the action determines the question of jurisdiction, and when it sustains the jurisdiction, all questions of its *sufficiency*, under the allegations of the

proofs, pass under the proper cognizance of the court, with power to determine them according to the law and the facts.

This action is in its nature an action to remove relator for causes enumerated in Art. 196 of the Constitution. As to whether the special facts alleged establish the existence of any one of those causes, that is a question going, not to the jurisdiction of the court, but to the merits of the cause, and the court has the same power to decide those merits, whether presented by exception on the facts alleged or after trial on the facts proved. In neither case can the decision be arraigned under our supervisory power, when within the court's jurisdiction.

The Constitution, in enumerating the causes for removal in Art. 196, uses very general language and abstains from defining the particular acts which constitute them.

In applying the remedy provided much discretion is necessarily left to the judiciary in determining the kind and degree of acts which are embraced within the spirit and meaning of the Constitution, and sedulous precautions are taken to prevent the abuse of this discretion by granting the right of appeal and providing for the summary disposition thereof.

The judge may have been right or may have been wrong in overruling relator's exception. On that question we do not hint an opinion. Even if he had maintained it, the quotations we have made from the petition and from the exception itself, show that it would have eliminated only part of the cause of action, and would not have involved an entire dismissal of the action. If he was wrong, his error consisted not in maintaining his jurisdiction, which was incontestable, but in maintaining a partially insufficient cause of action. In that case relator will find his only appropriate relief in an appeal to this court, which the law secures to him.

Prohibition is not a writ of right, and even in cases of doubtful jurisdiction we do not readily grant it when there is adequate remedy by appeal. State ex rel. Follett vs. Judge, 32 An. 1182; State ex rel. Weber vs. Judge, Id. 1092.

It is therefore ordered that the provisional writs herein issued be dissolved, and that relator's application be denied.

No. 11,279.

STATE EX REL. JOHN CAWLEY VS. JUDGE OF FOURTH DISTRICT COURT, PARISH OF GRANT.

A party confined in jail under a decree of a competent court is not entitled to an absolute and immediate release from confinement upon making a surrender of his property and upon obtaining the judge's order of acceptance thereof. He must await the action of the meeting of his creditors.

Non constat that his cession and discharge may not be successfully opposed.

APPLICATION for writ of Mandamus.

Edwin G. Hunter for Relator.

Respondent *in propria persona*.

The opinion of the court was delivered by

WATKINS, J. It appears from the petition of the relator that, at the March term of the District Court of Grant parish for the present year, 1893, he plead guilty to the charge of selling liquor without paying a license, and was sentenced to pay a fine of $200 and costs, and in default of payment he was to suffer imprisonment in the parish jail for a period of four months, in keeping with the terms and conditions of Revised Statutes, Sec. 910, and he was imprisoned in default of paying fine.

That, availing himself of the provisions of the insolvent laws of the State, and particularly of those relating to debtors in actual confinement, he applied for their benefit for the purpose of regaining his liberty. That, notwithstanding the judge accepted his surrender and granted him the stay of proceedings against his person and property that is usual in such cases, he has refused to release him from custody and suffers him to be detained in prison. That the fine imposed must be placed upon the footing of any mere contractual obligation to pay money, and from which he is legally relievable by means of a discharge under the insolvent law. His averment is "that, after the order accepting the surrender was *signed*, he was, by virtue of that order, entitled to be released from custody, and that he has suffered great injury and a denial of justice at the hands of the said judge by his refusal to order his release from custody."

The respondent returns that he declined to release the relator from imprisonment because his order accepting his surrender and granting him a stay of proceedings directed the convocation of a meeting of creditors on the fourth Monday of May, 1898—which will occur on the 22d day of the month, a date that is still in the future—and that the relator is not entitled to liberation from imprisonment until said meeting shall convene and take action in the premises.

The code declares that "the *creditors* can not refuse the surrender made according to the forms ordained by law, unless in case of fraud on the part of the debtor.

"It operates the discharge of the restraint of the debtor's person and delivers him from actual imprisonment." R. C. C. 2176.

It is the *creditors* and not the judge who can discharge the insolvent. Thomas Burdon vs. His Creditors, 20 An. 364.

After the cession and acceptance of a surrender by the judge, all of the property of the insolvent vests in his *creditors*. R. S., Sec. 1791.

It is the duty of the judge when granting an order staying all proceedings against the insolvent's person and property to likewise grant an order convoking a meeting of creditors. R. S., Sec. 1790.

At the meeting of creditors their deliberations in respect to the sale or disposal of the property surrendered, *or for any other object relative to the interest of the mass of creditors*, the opinion of the majority of the creditors in number and amount shall prevail. R. S., Sec. 1799.

Any creditor of an insolvent debtor is entitled "to oppose the appointment of a syndic, or to charge fraud against the debtor * * * *within ten days next following the meeting of creditors*," etc. R. S., Sec. 1802.

And in addition to these general provisions clearly indicating that the insolvent can not be discharged immediately upon the judge's order accepting his surrender, the further specific declaration of the statute is that "any debtor who may be imprisoned under a writ of arrest, and against whom no charge of fraud is pending, may be discharged by making a surrender of his property to his creditors." R. S., Sec. 1819; 2 La. 503, Caldwell vs. Bloomfield.

From the foregoing provisions of law, we take it to be clear that there is no possible efficacy in the stay-order accompanying the judge's acceptance of a surrender, except to operate the *future* ex-

emption of the debtor from arrest and the molestation of his property by *individual* creditors. And while the acceptance of his surrender operates the transfer of the insolvent's property to his creditors, yet the creditors, collectively, can alone administer same and make orders looking to his discharge.

It is evident that the relator's application is premature and must be refused.

It is therefore ordered, adjudged and decreed that the application of relator for a peremptory mandamus be refused at his costs.

ON APPLICATION FOR REHEARING.

FENNER, J. Relator, imprisoned under criminal sentence, can not stand in better position than one under civil arrest, and even in the latter case, under Sec. 1819, Revised Statutes, the debtor claiming release must show not only a surrender accepted by the judge, but also that no charge of fraud was pending against him. The latter can only be established after the expiration of the delay within which the law provides that charges of fraud may be made, viz.: within ten days after the meeting of creditors. Such seems to have been the view of the statute taken by this court. Martin's case, 2 Mart. O. S. 78; Caldwell vs. Bloomfield, 2 La. 503.

We may add that relator's case is not, in our opinion, within the letter or meaning of Sec. 981, Revised Statutes. He is not "sentenced to pay a fine and costs and to stand committed until they are paid," in which case his imprisonment would not discharge the fine. His sentence is, in effect, alternative—*i. e.*, to pay the fine or, in default of payment, to be imprisoned for four months. If he serves his term of imprisonment the fine will be discharged. To such a case the statute does not apply.

Rehearing refused.

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No. 11,297.

THE STATE EX REL. CITY OF NEW ORLEANS VS. THE JUDGE OF THE TWENTY-FIRST DISTRICT COURT, PARISH OF ST. JOHN THE BAPTIST.

It is no longer an open question that *certiorari* can only be resorted to when proceedings are absolutely null.

It can not be made use of as a substitute for a motion to dismiss an appeal antecedent to the return day thereof.

APPLICATION for writ of Certiorari.

J. L. Bradford for the Relator.

W. S. Benedict and *Robt. J. Dugué* for the Respondent.

The opinion of the court was delivered by

WATKINS, J. The following are the grounds on which relator claims relief at our hands, viz.:

"John McDonogh, Jr., and Joseph Soniat Dufossat, Jr., on August 27, 1841, brought suit No. 20,505, in the First District Court in the parish of Orleans, against Alexis Fontenot, Jean Pierre Fontenot, Joachim Fontenot, Reine Fontenot (widow of Alexis Millet), Justine Fontenot (wife of Jean Batiste Audisson), and Felix Becnel, for slander of their title to lands in St. John the Baptist parish, held in indivision, one-third by McDonogh and two-thirds by Soniat Dufossat. The defendants were duly cited, but before answer the case was removed by New Orleans and Dufossat, under an act of the Legislature, to the District Court for St. John the Baptist parish, by supplemental petition filed therein, July 11, 1859, alleging that since the filing of the original petition in 1841 McDonogh had died testate, and that New Orleans had succeeded to his rights, and also that Joseph LeBourgeoise and Felix Becnel had succeeded to the claims and pretensions of the original defendants, and praying citation against them, etc. They were cited in 1859, but no answers or exceptions were filed, no defaults taken, or other proceedings had, and the cause was regularly continued, and stood so until February 26, 1892, when *New Orleans* filed a supplemental petition, alleging the death of Dufossat, leaving a large number of unknown heirs; that the claims and pretensions of Becnel and LeBourgeoise in the lands had vested in Joseph L. LeBourgeoise, Jr., residing in St. John the Baptist parish, who continued to slander the title of plaintiff, and refused and failed to bring suit to try the same, etc.; prayed for service upon him, LeBourgeoise, Jr., and for judgment on title, and for damages, etc. He was cited, and in due time filed exceptions and answer, and from time to time certain other persons,

alleging themselves heirs or other representatives of the original defendants, came in voluntarily as defendants and filed exceptions and answers.

"This jactitation suit is yet untried, and is now No. 713 of the docket of the Twenty-first Judicial District Court for St. John the Baptist parish.

"March 2, 1892, New Orleans brought suit against all the heirs of Dufossat for partition of the same lands in the District Court for St. John the Baptist parish, then Twenty-sixth District, under the No. 474, but when the district was changed to No. 21, the docket number became 40. The title of defendants to an undivided two-thirds of the lands was admitted, petitioner's own right to an undivided third was alleged, and partition by sale prayed. The defendants were all cited, and after several supplemental petitions were filed for appointment of curators *ad hoc*, etc., all answered, admitting plaintiff's title to one-third and taking issue only on the mode of partition.

"The case was regularly tried March 24, 1893, and after taking testimony as to the proper mode of partition, the court, in proceeding to judgment, was interrupted by an attorney at law, who represented Mr. Joseph L. LeBourgeoise, Jr., then also present in court, and read to the court and to counsel for the parties a "protest," alleging the protestant was one of the defendants in suit No. 713 and protesting against further proceedings in the partition suit until *all* parties therein made themselves parties-plaintiff in suit No. 713, and until all the defendants in said suit No. 713 were made defendants in the partition suit. On oral objection by counsel for plaintiffs and defendants in suit No. 40 the court refused to allow the protest to be filed, or to consider the same, or make it a part of the record in same, on the ground that protestant had not alleged any interest in the partition suit or asked any order in the premises. To this ruling protestant filed his bill of exceptions, and the court pronounced and signed judgment on the issues made in suit No. 40, decreeing the partition by sale, and making the usual orders for the execution of the judgment. Thereupon, the protestant moved the court for an order of suspensive appeal to the Supreme Court, and the same was granted *instanter*, on a bond for costs, in the sum of $200, the return day being fixed on the third Monday in January, 1894. No other steps have been taken in the District Court, and the judgment in partition remains inoperative.

"On May 5, 1898, New Orleans filed her petition in this court for a writ of certiorari to the judge of the Twenty-first Judicial District Court for St. John, and on May 6 the same issued, returnable the 11th of May. The prayer of the petition is that the record in the partition suit No. 40 may be certified and sent up, in order that the validity of the proceedings may be inquired into and determined, and that the order of appeal be declared illegal and the appeal dismissed, and for costs."

The respondent judge returns that the protest of Joseph L. LeBourgeoise, Jr., referred to by the relator, was prepared and read by his counsel as soon as the partition suit was called for trial, as stated in the bill of exceptions, and not as stated by the relator, after the testimony and argument had been heard.

He admits that a third person, not party to the original suit, filed, in open court, a motion for a suspensive appeal from the judgment rendered in the partition suit and that he granted the appeal, returnable on the proper return day to *this* court, which is the proper appellate tribunal, conditioned upon the appellant furnishing bond.

He further represents that he granted the appeal under and in conformity to the provisions of Art. 571 of the Code of Practice, as he was bound to do. That his court had jurisdiction of the parties and of the subject-matter of the partition suit. That the appeal has been perfected, and that his action in the premises is not open to review by certiorari. He further shows that certiorari can not be substituted for a motion to dismiss the appeal in question antecedent to the return day thereof.

There is no escape from the conclusive force of the reasons assigned by the respondent judge.

In State ex rel. Railroad vs. Riley, 43 An. 177, this court said:

"It is no longer an open question that 'certiorari can only be resorted to when proceedings are absolutely null.' State ex rel. Broussard vs. Justice, 39 An. 776; State ex rel. Wentz vs. Judge, 32 An. 1222."

The only purpose of the writ is to test the validity of the proceedings of another court extrinsically. C. P. 855, 857.

The case brought is an appealable one, and the relator's complaint is that it has been appealed to this court, but improperly.

The orderly and proper course for relator to have pursued was to await action in this court on the appeal. It has mistaken its remedy.

It is therefore ordered and decreed that the demand of relator for *certiorari* be rejected at his costs and the restraining order be set aside.

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No. 11,211.

THE STATE OF LOUISIANA VS. RICHARD L. ROBERTSON.

Under the general welfare clause to be found in all municipal charters, which is often implied from the other powers granted, the city or municipality can not enlarge these powers further than necessary to carry into effect the specific power granted.

All that the city of New Orleans can do in relation to boilers and steam machinery, under its charter, is to locate them, so that in case of explosion they will do the least injury.

Ordinance No. 6647, "an ordinance providing for the inspection of steam boilers, tanks, pipes, apparatus, etc., and to create a board of examiners and inspectors of engineers in charge of same, and to provide for penalties," is illegal, null and void.

APPEAL from the Fourth Recorder's Court of New Orleans. *Smith, J.*

E. A. O'Sullivan, City Attorney, for Plaintiff and Appellee.

O. B. Sansum for Defendant and Appellant.

The opinion of the court was delivered by

MCENERY, J. The City Council of New Orleans enacted Ordinance No. 6647, council series, entitled "an ordinance providing for the inspection of steam boilers, tanks, pipes, apparatus, etc., and to create a board of examiners and inspoctors of enginers in charge of the same, and to provide for the penalties."

Section 1 of the ordinance creates the office of inspectors and prescribes the qualifications of the members of the board.

Section 2 fixes the term of office of the members of the board and the amount of the bond to be furnished.

Section 3 vests in the board the power to inspect and test every boiler and apparatus under steam pressure used to propel or operate machinery not subject to inspection under the laws of the United States, and they are required to notify all owners or users of boilers

and apparatus under steam pressure of the time when an inspection or reinspection and test shall be made.

Section 4 that the inspectors shall be furnished with an office at the City Hall.

Section 5 requires that the owners or users of boilers or steam generating apparatus under steam pressure must have the same inspected before use and at least once a year thereafter, and for every neglect or refusal to have said inspection and test made they shall, upon conviction thereof by the recorder having jurisdiction, be fined a sum of not more than $25, and in default of payment of said fine shall be imprisoned for not more than thirty days, or both.

Section 6 requires every owner and user of a boiler, etc., to employ at least one competent engineer holding a license or permit from the board, and a neglect to conform to this requirement is visited by fine, and, in default of payment, imprisonment.

Section 7 provides for the examination by the board of engineers, a certificate of license costing the sum of $5 for the first year and $2.50 for each renewal, which is required annually.

Section 8 regulates the amount of steam pressure as allowed by the certificate of the board of examiners.

Section 11 regulates the fees for inspection, which are required to be paid by the owners of the steam machinery and boilers, and the fees for inspection are graduated from $3 to $17.

The defendant, owner of the Marine Dry Dock, situated within the corporate limits of the city, refused to have his boilers and machinery inspected in accordance with the provisions of said ordinance and he was arrested, tried and convicted before the Fourth Recorder's Court of said city. He appealed on the ground of the illegality and unconstitutionality of said ordinance.

If the ordinance is legal and valid, the power of the recorder to inflict the penalty is undoubted since the passage of Act No. 41 of 1892, which authorizes the recorder "to enforce obedience to or to punish the violation of all ordinances passed by the City Council thereof in execution of the powers and duties indicated in Secs. 7 and 8, and the amendments thereof of Act No. 20 of 1882, known as the charter of the city of New Orleans, by fine or imprisonment, or both, or by imprisonment in default of the payment of the fine, provided that the fine shall not exceed $25 for each offence, nor the imprisonment more than thirty days as provided by Sec. 12 of Act 131 of 1877."

The penalty therefore under said act can be enforced for the violation of a city ordinance, as the right has been expressly conferred by the Legislature.

The only question therefore which is presented is as to the power of the City Council to enact said ordinance. It is admitted that there is no express power granted to the city in its charter to create the office of inspector and a board of inspectors of boilers and steam apparatus, and to require the owners and users of boilers and steam apparatus to employ engineers licensed by the city and for said users of such boilers and machinery to submit them to inspection and to pay fees therefor.

The contention of the city of New Orleans is that its charter authorizes it to pass all ordinances necessary to preserve the peace and good order of the city, and to maintain its cleanliness and health, and therefore it has the power to enforce by fine and imprisonment the violation of an ordinance for the protection of life and property, and that said ordinance was enacted for the protection of the lives of the citizens of New Orleans.

If said ordinance springs from a necessary and implied incident to the power expressly granted to preserve the public peace and to maintain the cleanliness and health of the city, it is a valid ordinance.

There can be no doubt that it does not spring from the power to preserve the public peace as incident to the exercise of that power.

Ordinances to preserve the public health have been liberally construed, and the authorities have gone to a great length in enumerating the implied powers of municipalities to enact laws to protect the community from infectious and contagious diseases, from bad water, against nuisance injurious to health, and noxious odors and gases. As the preservation of the public health and the safety of the inhabitants is one of the chief purposes of local government, all reasonable ordinances in this direction have been sustained.

The ordinance in question does not pretend to preserve and promote public health.

But it is claimed that it protects the life of the citizen by providing for the inspections of steam boilers, etc., and this is implied from the power to legislate for the public health, and that its preservation is necessary to protect the life of the citizen.

Ordinances of this character, to preserve public health, are generally directed to those objects which in themselves are presumed

to be injurious to the public health, such as those enacted for the purpose of abating nuisances which are injurious to health, the location and regulation of markets, hospitals, slaughter houses, cemeteries, etc.; those for the prevention of the introduction of contagious and infectious diseases and their dissemination in the community, and on all matters which may promote the cleanliness and health of the city.

The establishment of steam machinery in a particular locality is not in itself injurious to public health. It is dangerous only either from coming into too close proximity to it, or from the explosion of boilers, or the breaking of the machinery.

If the ordinance is a valid one, it must fall under the general welfare clause, either found in charters of municipalities or inferred from the powers granted. Dangerous articles, such as gunpowder, oil, dynamite, or other such articles composed of elements which are likely to explode from the slightest extraneous causes, by the agitation of the particles composing them, are generally regulated under this implied or granted authority as to their location and sale; but even in these cases an enlargement of the powers granted will not be exercised further than necessary to carry into effect the specific power granted.

In the instant case the power to create the office of inspector and a board of inspectors and examiners, with the power to examine engineers and to grant certificates of competency, and to inspect boilers, etc., is nowhere to be found in the city charter, and the necessary implication for it can not be inferred from any of the powers granted. Probably the only implication from the granted powers found in the charter would be the right to locate steam boilers, machinery and apparatus in a safe place, where an explosion would do the least injury.

It has been held, and properly so, that under the authority to make police regulations or to pass by-laws for the good government of the corporation, it has the right to require hoistaways inside of stores to be enclosed by a railing and closed by a trap after business hours of the day. It was regarded as a reasonable regulation because it did not unreasonably interfere with private rights. But if these owners of the hoistaways had been compelled to pay for their repeated inspections, there can be no doubt that the exactions would have been held to be unreasonable.

We have carefully examined the ordinance and find it illegal in every feature. There is no power in the charter to authorize it; it is not a necessary implication from the specific powers granted, and is unreasonable.

It is therefore ordered, adjudged and decreed that the judgment appealed from be avoided, reversed and annulled, and it is now decreed that said Ordinance No. 6647, Council Series, be declared null and void and the prosecution of defendant thereunder be dismissed.

Rehearing refused.

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No. 11,294.

THE STATE OF LOUISIANA VS. RICK MURPHY.

There are two modes guarding against the abuse of a witness on cross-examination who testifies in his own behalf as a defendant.

1. The privilege to decline to answer any question which may tend to charge him as a criminal.
2. The power of the court to protect the defendant from unreasonable or oppressive cross-examination.

It is not shown that one or the other was denied.

Where upon the trial the defendant offers himself as a witness and testifies in his own behalf, under statute of 1886, he thereby becomes subject to the same rules and is called upon to submit to the same tests which are legally applied to other witnesses.

The question propounded to the defendant on his cross-examination was competent for the purpose of proving that he had been arrested for stealing prior to the date of the theft for which he was on trial.

APPEAL from the Criminal District Court for the Parish of Orleans. *Moise, J.*

M. J. Cunningham, Attorney General, for the State, Appellee.

J. J. Foley for Defendant and Appellant.

The opinion of the court was delivered by

BREAUX, J. The defendant was convicted of larceny.

From the verdict and judgment he appeals, and urges as error that the prosecuting officer propounded to him, while he was testifying as a witness in his own behalf, the question:

"Have you ever been arrested for stealing?"

His grounds of objection were that he was compelled to answer, under the rulings of the trial judge, over his objections; that it tended to degrade his character.

That he had not put his character at issue.

That the records, if any, were the primary evidence of the facts sought to be proven.

In reference to the last objection the trial judge states, as part of the recital in the bill of exceptions taken by the defendant, that the defendant, as a witness, was not denied the privilege of explaining the circumstances of his arrest. Act 29 of 1886.

The defendant, in availing himself of the privilege of testifying in his own behalf, was subject to all the rules that apply to other witnesses. Act 29 of 1886.

The accused was not compelled to testify; the statute declares that the failure to testify shall not create any presumption against a defendant.

Having offered himself as a witness, and having testified, he was called upon to submit to the same tests which are legally applied to other witnesses.

The witness can decline to answer any question which may tend to charge him as criminal.

Moreover, the court has the power to protect him against unreasonable or oppressive cross-examination.

These modes of guarding against the abuse possible under the statute are not in question; it is not suggested that they were disregarded. The question complained of was propounded for the purpose of impairing the credibility of the witness.

The defendant appeared before the court in the dual capacity of an accused and that of a witness.

As an accused his character was not subject to attack unless he opened the question.

As a witness his position was different—his credibility was subject to attack. State of Louisiana vs. Walsh et al., 45 An.; State of Louisiana vs. Lee Taylor et al., 45 An.

The dividing line between the testimony admissible for the purpose of impeaching the credibility of a witness who testifies in his own behalf and that not admissible in his cross-examination, as it may tend to criminate him, is not always apparent.

As a defendant his character could not be impeached, that issue not having been opened by him.

As a witness it could be impeached, as the character of any witness may be subjected to that test.

In other words he may be unworthy of belief, but this unworthiness is not to be considered in determining whether or not he is guilty.

While the attack upon the character of an accused is for the purpose of establishing that his plea is not supported by his attempt at proving character and that he is guilty.

Much is left to the good judgment and discretion of the trial judge.

His discretion was properly exercised, for the testimony was admitted on cross-examination, and we understand was afterward referred to as admissible for the purpose only of proving the incredibility of the witness.

PROOF OF ARRESTS BY DEFENDANT'S TESTIMONY, ADMISSIBLE.

The question propounded was competent in its character. It was not objectionable as proving a fact by secondary evidence, and the production of a record or warrant could not be required.

The mere arrests were provable by the testimony of the defendant on his cross-examination.

The question was admissible for the purpose, whether or no there was a record. The warrant could issue from a court not of record.

Parol evidence is admissible for the purpose of proving that a particular person has been in prison. Wharton Crim. E., p. 754.

It follows that the testimony of the defendant was admissible to prove that he had been arrested at different times.

The judgment should therefore be affirmed.

Judgment affirmed.

ON APPLICATION FOR REHEARING.

BREAUX, J. The accused appealed from the judgment and sentence of the court under a conviction of larceny, and complains of our opinion as erroneous on the sole ground, to-wit:

Having elected to take the witness stand in his own behalf he was compelled, aver his objections, to answer the followingquestion, viz.:

"Have you ever been arrested for stealing?" and to which question counsel urged objections.

1. That the accused had not put his character at issue, and the State could not do so.

2. That it tended to degrade his character.

3. That the judicial records, if such there were, constituted the best evidence of the fact sought to be elicited by the question.

The theory of our opinion is, that the accused, under the law, occupied the same plane as other witnesses, and, upon cross-examination, could be submitted to the same tests.

That the question propounded did not tend to incriminate the accused, but to affect his credibility as a witness—he occuping, at the time, the dual position of *accused* and *witness*, and the weight and value of his testimony depending upon the *credit* same was entitled to receive.

The court held that as an accused his character could not be attacked by the prosecution until put at issue as a means of defence; but, as a witness, his situation was altogether different—his credibility being open to attack by any reasonable and proper means or methods.

Proceeding to deal with this question upon the principles laid down, the opinion states that, in such a case, the line of demarcation between the *admissibility* of testimony for purposes of impeachment of credibility and its *inadmissibility* as impeaching character is not always apparent, and, therefore, much must be left to the good judgment and discretion of the trial judge, who is better able to decide under the surroundings and circumstances of each particular case.

Counsel's argument is that the objection urged is general, and would be equally applicable to any other witness than the accused—his insistence here being that want of credibility must be proved by *general reputation*, and not by particular incriminating facts.

That proposition is true when the evidence is offered for the purpose of impeaching the witness' "*credit for veracity.*" Such is the purport of the authorities cited. 1 Glf., Sec. 461.

But in this case the trial judge had before him a person accused of and on trial for the commission of a larceny. Accepting the grace of a special statute, entitling him to be heard as a witness in his own favor, the veracity and credibility of the *witness*, *generally*, was proper subject-matter for investigation, because of the cloud that surrounded him and necessitated closer scrutiny into his veracity than that of an ordinary witness.

Being under charge of larceny, what more damaging fact could have been elicited on the trial of such charge than that he had been previously arrested for similar offences.

There is no force in the objection to parol evidence being admitted of the *fact* of the defendant's previous arrest. The object in view was to show that the one pending before the court was not the first accusation of the kind that had been preferred against him—not to show the truth or falsity of such charge.

Both the points made in the lower court were correctly disposed of.

Rehearing refused.

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No. 11,284.

SUCCESSION OF THOMAS A. STEPHENS.

The qualified recognition of a legacy by the executor will not carry with it the payment of interest prior to demand for its delivery.

A disposition by will in which the property donated is to remain in the hands of the executor until a legatee who has arrived at the age of majority shall be twenty-four years of age can not be distinguished from one that seeks to prohibit the sale or other exercise of the right of ownership and is therefore an impossible condition, illegal and to be reputed as not written.

The persons and estates of minors are placed under the power of tutors and undertutors.

Interest on particular legacies is due from the day of demand for its delivery.

APPEAL from the Civil District Court for the Parish of Orleans. *Monroe, J.*

Gus. A. Breaux for the Executor, Appellant.

Chrétien & Suthon for the Tutrix, Appellant.

George C. Préot and *James D. Séguin* for Appellees.

The opinion of the court was delivered by

BREAUX, J. The questions for decision are:

1. Whether an executor's authority, after having invested the amounts of the legacies as directed, continues under the terms of the

will, and includes the duty of retaining possession and administering the interests for the protection and benefit of the legatees, or should he deliver the evidence of indebtedness and title of investment made by him to the legatees.

2. Whether the interest on a legacy of a certain amount runs from the date of the filing of the tableau recognizing the indebtedness of the succession.

By the following excerpts, from the testament of the decedent, the pertinent facts of the case are set forth, viz.:

"After all my just debts are paid I give to Edna May Byrne, daughter of John P. Byrne and Ida Blackburn, the sum of $1000, to be put out at interest until she becomes of age, interest to be paid yearly for her education, clothing and support.

"I give to Octavia, Felicity and Jules Brunet, three children of Jules Brunet and Octavia Wolf, $500 each, to be put out at interest until they become of age, interest to be paid yearly.

"I give and bequeath to Sophie Egloff, now living with Mrs. Alice Mora, $500, to be put out at interest until she is twenty-four years of age, interest to be paid yearly.

"I give and bequeath to Bertha Egloff, now living in my house, $3500, whereof $3000 are to be out at interest during her life, the interest to be paid yearly, and the remaining $500 are to be paid in cash to her in two equal instalments of $250 each, one at my death and the other one year after my death. * * *

"I give the remainder of my effects to Mrs. Alice Mora, wife of Thomas Mora. * * * * * *

"I charge my said executors to pay all my just debts, and then to distribute my estate as above provided, investing those legacies that are required to be put out at interest in such securities as they may deem best in the names of the said legatees."

Two of the plaintiffs in rule, who apply to be placed in possession of certain legacies, are tutors of the minors who are legatees.

The plaintiff in another rule pending before us on appeal is of the age of majority.

The possibility that the disposition is a *fidei commissum* is suggested in argument; also that it involves a substitution.

It is also contended that an "impossible condition" attaches to the bequest.

In reference to the first *fidei commissum*, it being "a disposition

by which the donee, the heir or legatee is charged to preserve for or return a thing to a third person," it does not include within its meaning any of the bequests of the will.

It does not contain any gift to the donees through the agency of a third person in confidence that he will dispose of the amount for the benefit of the donees—*i. e.*, no one "is charged to preserve for or to return a thing to a third person."

The donations of the decedent are absolute. They are made without attempting to interpose any third person.

The investment of the funds as directed in the will, and the manifest desire of the testator of protecting the interest of the donees, do not involve a *fidei commissum*.

In reference to the prohibited substitution tested by the discussion of the authorities and the decision, Marshall vs. Pearce, 34 An. 587, there being no duty imposed upon the executor and no condition attached to the donation to deliver the property ostensibly donated, or really donated for a period to another, the real donee at any time, it can not in reason be held to fall within the definition given.

In the opinion it is said: "The simplest test to the substitution prohibited by our law is that it vests the property in one person, * * * and at the death of such person vests the *same property in another person*, who takes the same directly from the testator, but by a title which only springs into existence on the death of the first donee.

"Such a disposition destroys the power of alienation of the property by the first donee, because he is bound to hold it until his death in order that the person then called to take the title may take it.

"At the same time no power of alienation exists in the second donee during the life of the first, because this title only comes into being at the death of the taker."

No such condition presents itself under the will in the case at bar.

The legatees have absolute title, transferable and heritable. No others are named to have any interest; it is therefore not a prohibited substitution.

In reference to impossible conditions, defined as being those that are contrary to the laws or to morals, and as such reputed not written.

That article (900 of the Code Napoleon and Art. 1519 of the Lou-

isiana Code) says: Marcadé, Vol. 3, p. 583, declares that in gratuitous dispositions all conditions physically or legally impossible are made nugatory by law, to that extent that the disposition becomes one pure and simple, and has effect as if the impossible condition had not been written. If the condition is illegal it is ignored and considered not written.

The condition attached, relating to the administration of the property by the executor, has features denying to the donee of age the enjoyment to which she has a right as owner.

The intention of the testator is the law of the will.

"I give and bequeath" are the positive and disposing words, intending to vest the donee with the right named.

They, the legatees, are the absolute owners.

"Ownership is the right by which a thing belongs to some one in particular, to the exclusion of all other persons." C. C. 488.

"The ownership of a thing is vested in him who has the immediate dominion of it, and not in him who has a mere beneficiary right." C. C. 489.

"Ownership is perfect when it is perpetual and the thing is unencumbered with any real right toward any other person than the owner." C. C. 490.

The legatees are vested with these elements of ownership.

The impossible conditions attached to the legacy are as if not written.

By executing the condition maintaining the executor's possession and his right to administer, the property is practically taken out of commerce and the authority to alienate is denied.

As to the denial of the right of alienation to the owner we have the authority of Sirey, Codes Annotés, p. 387, Sec. 47, and Demolombe, Vol. 18, Sec. 290, in support of the statement that the condition not to alienate is an impossible one to impose upon a bequest of the ownership of property.

From the former we translate:

"That condition is impossible and to be expunged prohibiting the legatee from selling or binding or encumbering the property before a certain epoch."

From Demolombe:

"The prohibition not to alienate is at most a precept, a *nudum præceptum*."

In Partee vs. Hill, 12 An. 767, it was decided "that the appointment by will of trustees to receive a sum of money bequeathed by the testator, and to pay the interest on it annually to the legatee, will be disregarded if the legatee refuses to acquiesce in the creation of such an agency."

From Succession of Franklin, 7 An. 395, we quote:

"Any illegal or impossible condition the disposition may contain is presumed to have been inserted inadvertently" and not written. Clague vs. Clague, 13 La. 1.

The propositions are well supported by trustworthy authority that impossible conditions are to be considered not written, and that the condition attached to the legacy of the decedent is an impossible condition.

In his elaborate opinion the learned judge of the court *a qua* says:

"There appears to have been some confusion in the following opinion of the 'impossible condition' with the *fidei commissum*, but as the judgment sustained the legacy and merely held the condition to be void, its meaning, legally speaking, was that there was an impossible condition and that there was not a *fidei commissum*, for if the latter had existed the whole bequest would have been null. 36 An. 754.

"I am aware that there may be some difficulty in reconciling the conclusion of the Supreme Court in the case cited with the ruling in Macias and Strauss cases, 31 An. 127, 38 An. 59, but as the case cited has not been overruled, in terms, and is supported by other decisions previously rendered, I feel authorized to rely on it in this case."

We concur in the conclusion of the district judge, relative to the Steven case, 36 An. 754, as authoritative when the legatee is *sui juris*.

The two cases, Macias and Strauss, deflect somewhat from the line of preceding decisions.

We will not discuss the departure.

They apply to the interests of minors.

Whatever may be the appreciation of those decisions, when the necessity will arise for their consideration we are confident that the principles announced will not be extended as applying to legacies to persons not under legal disability.

The legatee of age has the absolute right to the dominion of the property donated to her.

These last decisions countenance the creating of a *quasi* tutorship *quoad* the legacy.

They will have to undergo the test when a question arises involving the interests of minors.

In the case at bar the minors' interests are not affected by such a condition as attached to the legacy of the legatee of age.

It was not sought under the terms of the will to charge the executor with the duty of administering their interests until they are of age.

After investing the amount of the legacies it does not appear that it was the testator's intention that he should collect and account for the interest until the majority of the minors.

The will being silent regarding the collection of and accounting for, the interest of the minors, that duty devolves upon the tutor.

"The persons and estate of minors shall in all cases be placed under the power of tutors and under-tutors. C. P. 958; Succession of Fucher, 30 An. 1017.

Interest is due from the day of the demand for delivery. C. C. 1626.

Interest is only due on particular legacies from the date provided in the article of the code.

In the case to which our attention is directed the issue, it appears, was as to whether the interest should run from 1857 or 1872. The court held that it should run from the last date. There was no question presented or decided as between the last date and that of demand.

In Ventrèss vs. Brown, 34 An. 461, there was a question of equity:

"Equity, besides, entitles Isaac D. Brown to that allowance. Interest was allowed his sister, Mrs. Faltus. There is no reason why she should not also receive it."

We adhere to the article of the code that interest is due from demand.

Le legataire particulier n'a jamais droit aux fruits qu'a partir de sa demande. Marcade, Vol. 4, p. 69.

The judgment of the court *a qua* is affirmed at appellant's costs.

ON APPLICATION FOR A REHEARING.

Conceding *argumenti gratia* the law points presented for appellants in their application for a rehearing, there are obstacles in the way of granting the application.

The executor acknowledged the legacies by carrying them in his account. But the conditions attached excluded them from the rank of legacies deliverable *instanter*.

The testator willed the payment of his debts; the investing of the amount of the legacies.

In reference to the legatees who are minors, he did not clearly direct by whom the funds should be managed, after their investment in accordance with the terms of the will.

In so far as related to the legatee of age the testator, after the investment, placed the management in the hands of the executor.

This restriction was nugatory, and the amount will now be turned over to this legatee.

The executor who files an account can not be held to the payment of interest on particular legacies, prior to the demand for their delivery, though he may recognize them as just and legal; if the admission is accompanied with conditions rendering it equitable and proper that interest be not allowed.

The sale of the property, the payment of the debts, the interpretation of the conditions of the will not clearly expressed, involved delay which the judge of the court *a qua* did not consider unreasonable. With his views upon the subject ours coincide.

The legatee of age, as to interest, claimed that the rule sued out by her should be made absolute, in so far as to order the executor to invest the sum of $3000 in her name, with legal interest thereon from June 6, 1891. Interest by the judgment is allowed from 30th January, 1893, the date that her demand was filed, to the date of investment ordered.

She acquiesces in the judgment and does not apply for a rehearing.

The appellant, John F. Byrne, natural tutor, claimed interest on a thousand dollars from 6th June, 1891.

By the judgment he is allowed interest from the date his demand was filed—*i. e.*, November 28, 1892.

The other petitioner for a rehearing, Mrs. Octavia M. Wolf, natural tutrix of minors, who are particular legatees, did not in their rule for delivery of the legacy after investment claim interest from any time prior to the filing of her demand.

She was allowed interest from the day her demand for delivery was filed—*i. e.*, 30th January, 1893, to the date of investment.

We think the judgment is correct and does justice to the parties.

Rehearing refused.

CASES

ARGUED AND DETERMINED IN THE

SUPREME COURT OF LOUISIANA,

AT MONROE,

IN

JUNE, 1893.

JUDGES OF THE COURT:

*HON. FRANCIS T. NICHOLLS, *Chief Justice.*

HON. CHARLES E. FENNER,
HON. LYNN B. WATKINS,
HON. SAMUEL D. McENERY,
HON. JOSEPH A. BREAUX,
} *Associate Justices.*

*Absent during this term.

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46 1526

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118 101

No. 1272.

THE STATE OF LOUISIANA VS. ABE THOMPSON.

1. It is the duty of the court to instruct the jury upon every phase of the case made by the evidence. Where evidence is offered to prove a certain state of facts, and the claim is made that they are proved, the court should, if requested so to do, charge the jury what the law is as applicable to the facts claimed to be proved. State vs. Tucker, 38 An. 536, and 38 An. 789.
2. When two parties have had a difficulty, if one of them quits the combat and retreats in good faith, and is pursued by the other, who continues to follow him up with violence and hostility, and should it become absolutely necessary for the one retreating to turn and fell his pursuer in order to save his own life, he is justifiable, whether he was the aggressor in the beginning of the difficulty or not. State vs. Tucker, 38 An. 536 and 789; Archbold's Criminal P. and P., Vol. 1, p. 690; Am. and Eng. Ency. of Law, Vol. 9, p. 602.
3. A person free from fault when attacked by another, who manifestly attempts by violence to take his life, or to do him great bodily harm, and under such

circumstances that no retreat is practicable, is not only not obliged to retreat, but may pursue his adversary until he has secured himself from all danger; and if he kill him in so doing, it is justifiable self-defence. 1 East P. C. 271, 272; Luby vs. Com. 12 Bush (Ky.) 1; Pond vs. People, 4 Cooley (Mich.) 177; 2 Starkie on Evidence, 963; Foster, C. L. 273.

4. In criminal trials it is the exclusive province of the jury to weigh and give effect to the evidence.
5. When a charge asked was applicable to the facts, as set forth in the bill of exceptions, and when the trial judge does not specifically deny such facts, but virtually admits the material ones by quoting them in hypothetical cases in his general charge, then it was the plain duty of the trial judge to have given such charge; and his opinion of the merits of the case is no excuse for not giving it.

APPEAL from the Criminal District Court for the Parish of Orleans, *Baker, J.*

John J. Finney, Assistant District Attorney, for the State, Appellee.

Chandler C. Luzenberg for Defendant and Appellant.

The opinion of the court was delivered by

FENNER, J. The defendant was prosecuted for murder, convicted of manslaughter, and sentenced to pay a fine of $2000 and to suffer imprisonment in the State penitentiary at hard labor for the term of twenty years. He appeals from the verdict and sentence and relies for their reversal on two bills of exception taken to the refusal of the judge to give two special charges to the jury as requested by him.

The first special charge is in the following words:

"I charge you that when two parties have had a difficulty, if one of them quits the combat and retreats in good faith, and is pursued by the other, who continues to follow him up with violence and hostility, and should it become absolutely necessary for the one retreating to turn and fell his pursuer in order to save his own life, he is justifiable, whether he was the aggressor in the beginning of the difficulty or not."

It is not disputed that the charge embodies a sound statement of the law. State vs. Tucker, 38 An. 536, 789; 1 Archb. Cr. P. and P., p. 690; 9 Am. and Eng. Encyc. of Law, p. 602.

But the judge declined to give it, for the following reasons stated on the bill:

"*Per Curiam:* The facts did not justify such a charge. Thompson was a strong, robust man, armed with a loaded revolver concealed on his person. Mitchell was a boy 17 or 18 years of age, unarmed and open handed. Thompson was not in danger of his life or of great bodily harm. He could have retired from the contest just as his companion Moore did. There was but one difficulty. Mitchell was shot in the back of his head, evidently turning away from his assailant."

The charge may not have been justified by the facts as the learned judge appreciated them, but it was certainly applicable to the testimony given by witnesses in the case as carefully recited in the bill and not denied by the judge. The bill shows that there was testimony to the effect that there had been a collision and angry words between Thompson and deceased at the corner of Camp and Gaiennie streets, from which Thompson retired and retreated up Camp street; that deceased, with four or five companions, pursued Thompson, surrounding and beating him and assaulting him with bricks and stones up to the moment of his turning and shooting the deceased.

This testimony may have been true or false, or may have been in utter conflict with other superior evidence; but it was the exclusive province of the jury to estimate and determine its weight, and, if believed by the jury, it furnished proper and serious ground for the contention by counsel that it was necessary for defendant to turn and slay his pursuer in order to protect his own life, and he was entitled to the special charge asked. We had occasion to discuss this subject very carefully in Tucker's case, where we held as follows:

"When a bill of exceptions recites the facts which the counsel had contended before the jury had been established by the evidence, and refers to the evidence in support thereof, and asks for charges applicable to the state of facts recited, the judge's refusal to give the charges on the ground that they are inapplicable to the case is error, unless the judge states there was no evidence in the case supporting or tending to support the contentions of counsel." State vs. Tucker, 38 An. 536.

The second special charge refused by the judge was the following:

"If you find, from all the evidence heard upon this trial, that the accused was attacked by the deceased and others who manifestly attempted, by violence, to take his life or do him great bodily harm, and under such circumstances that no retreat was practicable, then

I charge you, if you should so find, that under such conditions the party who is attacked is not only not obliged to retreat, but may pursue his adversary until he has secured himself from all danger, and if he kill him in so doing it is justifiable self-defence."

The law as here laid down is not disputed by the judge and is supported by ample authority. 2 Starkie on Ev. 963; Foster's Crown Law, p. 273; 1 East P. C. 271; 9 Am. and Eng. Encyc. of Law, p. 600; Pond vs. People, 4 Cooley 177 (Mich.); Luby vs. Com., 12 Bush (Ky.) 1.

The judge gave the following reasons for refusing the charge:

"*Per Curiam:* I made three hypothetical cases in charging the jury, based upon the evidence and covering the law of murder, manslaughter and self-defence, as applicable to the facts of the case. There was no attempt to take defendant's life or to do him bodily harm. Retreat was eminently practicable, as defendant's companion, Moore, retreated safely. There was absolutely no necessity for the taking of human life."

Looking at the charges which the judge referred to as having been given, the only one having any applicability to the state of facts referred to in the charge asked is the following:

"If, however, you find from the facts of the case that the deceased and his companions were the aggressors; that they seriously assailed the prisoner at the bar, and pursued him to Camp street up to the point where the killing occurred; that they were armed with rocks or bricks or other dangerous missiles or weapons; that they surrounded the prisoner and began an attack so violent and fierce as to endanger his life or to inflict great physical injury on him, or to make the defendant honestly believe by reason of the suddenness, violence and determination of the attack that his life was in danger, or that he was in danger of great bodily hurt; that the suddenness of the attack and the numbers of his assailants was such that he could not escape, and that it was necessary for him under the circumstances and to preserve his life or his person from great bodily harm to slay the deceased, then he is not guilty, and you should so find by your verdict."

This is an excellent statement of the law as far as it goes, but a comparison of it with the charge asked shows that it entirely omits the vital point in the latter touching the right of the defendant, under the circumstances stated, "to pursue his adversary" in order to

secure himself from danger. The recitals of the bill, not contradicted by the judge, show evidence to the effect that at the moment of the shooting the deceased had turned and was trying to get away from the accused and was actually running away, and that, thereupon, the counsel for the State contended that these facts were fatal to the defence.

It thus became important to accused to have the law correctly charged as to his rights to turn upon a retreating adversary and even to pursue him if necessary to secure his own safety.

We are bound to hold that the judge erred in refusing the charge asked. His statements that retreat was practicable, that there was no attempt to take the life of accused or to do him bodily harm, and no necessity for taking life, are obviously the judge's inferences from the testimony, which belonged to the exclusive province of the jury, there being evidence tending to show the contrary and justifying defendant's counsel in so contending.

It is therefore adjudged and decreed that the verdict and sentence appealed from be annulled and set aside, and that the case be remanded to the lower court for a new trial and further proceedings according to law.

No. 1265.

THE STATE OF LOUISIANA VS. JOHN ALEXIS.

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52 551

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In case an accused person avails himself of the grace of the special statute authorizing him to testify in his own behalf, he occupies the dual position of witness and accused, and his credibility may be attacked by interrogating him in reference to his having been previously prosecuted or criminally punished, and his character indirectly involved.

APPEAL from the Fifteenth District Court, Parish of East Baton Rouge. *Buckner, J.*

Geo. K. Favrot, District Attorney, for the State, Appellee.

Cross & Cross for Defendant and Appellant.

The opinion of the court was delivered by

WATKINS, J. From a conviction of the crime of petit larceny and sentence to six months' imprisonment in the penitentiary, the de-

fendant prosecutes this appeal, relying upon a single bill of exceptions which he reserved to the ruling of the trial judge with regard to the admissibility of certain testimony.

It appears from the bill of exceptions that the accused availed himself of the grace of the special statute on the subject, and testified as a witness in his own behalf, and during the cross-examination he was asked the question whether he had not previously served a term in the penitentiary. To this question the objection was interposed that it involved a question of character, and it could not be drawn in question by the prosecution for the reason that the defendant had not put it in issue.

This identical question was raised and decided contrary to present contention in the recent case of State vs. Rick Murphy, 45 An. —, the theory of our opinion being that the question was rather one touching the *credibility* of the accused as a witness than his *character* for honesty. The court was of opinion that the position occupied by the defendant was dual, he being, at one and the same time, witness and accused; and that, occupying such position, the prosecution was thus entitled to test his credibility. Whar. Crim. Ev., Sec. 489; 33 An. 537.

Judgment affirmed.

No. 1275.

THE STATE OF LOUISIANA VS. SARAH NASH.

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104 446
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117 1094
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f120 347

There having been no note of the evidence taken at the trial, except that which counsel has summarized and incorporated in a bill of exceptions, we feel bound, under repeated decisions, to accept the judge's statement in case of any variance between them. And the statement of the judge being that the confession of the accused was free and voluntary, it was admissible in evidence.

APPEAL from the Fifteenth District Court, Parish of East Baton Rouge. *Buckner, J.*

Geo. K. Favrot, District Attorney, for the State, Appellee.

G. W. Burgess for Defendant and Appellant.

The opinion of the court was delivered by

WATKINS, J. The accused having been convicted of petit larceny and sentenced to six months' imprisonment in the State peniten-

tiary prosecutes this appeal, relying for relief upon a single bill of exceptions taken to the ruling of the trial judge admitting in evidence certain confessions—her objection being that they were not freely and voluntarily made, but "extorted under duress and threats of criminal prosecution."

The defendant's bill of exception states that the pertinent evidence was, in substance, that the prosecuting witness had called her out of his house and took her in custody, having caught her stealing chickens, stating that he was going to put her in jail; whereupon the said accused made statements admitting the theft, and promising to pay the prosecutor for the stolen property if he (the prosecutor) would keep her from going to jail.

But the trial judge appends to the bill of exceptions the following statement of the proven facts of the case, viz.:

"It was proven by the State, by Richard Williams, that he had caught the accused in his yard and in possession of four chickens. That she had fled, but was pursued and caught, and, while in the possession of the prosecuting witness (who was not an officer), she offered to pay for the chickens. All this was voluntary on the part of the accused."

The judge's ruling was undoubtedly correct. There was not, in our opinion, the least show of force or coercion used by the prosecutor to superinduce the confession made. The accused was caught in the actual possession of the property that had been recently stolen, and the captor was not an officer of the law.

We simply adhere to a general principle announced in many cases, that we feel bound to accept as our guide the statement of fact that is furnished by the judge in case of there being any doubt as to the facts proved at the trial—the testimony not having been reduced to writing and appended to a bill of exceptions. State vs. Pomp Joseph, 45 An.

Judgment affirmed.

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114 323

No. 1273.

THE STATE OF LOUISIANA VS. W. A. JACKSON.

Act 35 of 1890 authorizes the district attorney to file information in the office of the clerk of the District Court, when not in session, in all cases where the penalty is not imprisonment at hard labor or death. His duty in filing such information is not limited to those held in custody by the sheriff.

APPEAL from the Third District Court, Parish of Union.
Barksdale, J.

J. D. Everett, District Attorney, for the State, Appellee.

Kidd & Van Hook for Defendant and Appellant.

The opinion of the court was delivered by

McENERY, J. The defendant was convicted for retailing spirituous liquors without a license, and fined in an amount over three hundred dollars.

He was tried on an information filed by the district attorney, under Act 35 of 1880. He filed a motion for a new trial on the ground that the verdict of the jury was contrary to the law and the evidence, and that the district attorney in his closing address to the jury referred to matters outside of the record, which were calculated to mislead them. The motion was overruled, and he then filed a motion in arrest of judgment, "for the reason that the bill of information on which defendant was tried and convicted by the jury was filed at a time when no court was in session and out of term time, and avers that such proceedings in a case of this character are illegal, null and void." This motion also was overruled.

1. There is no evidence in the record to sustain the ground alleged that the verdict was contrary to the law and the evidence. The second ground for the motion, the indiscreet utterances of counsel in argument, is disposed of for the reasons assigned in the case of State vs. Randall Anderson and Allen Blackstone (45 An.), recently decided.

2. Act No. 35 of 1880, under the provisions of which the defendant was tried, is not logically arranged by sections. The several sections are, however, closely related and germane to each other, and the act as a whole is consistent. The title of the act is "to provide for the trial of offences where the penalty is not necessarily imprisonment at hard labor or death, and the several sections of the act are responsive to this title.

Logically arranged the act authorizes the holding of the District Courts at terms other than regular jury terms, and empowers the judge to order a special jury for the trial of all criminal cases where the penalty is not necessarily imprisonment at hard labor or death. That in all trials of such cases, under the act, they shall be before a jury of five, giving the defendant the right to elect to be tried by

the court, and to challenge five jurors peremptorily and any number for cause.

In the trial of cases provided for, the district attorney is authorized to file informations in the office of the clerk of the district court, which said filing shall be as valid as if made in open court. The act provides that the sheriff shall, immediately after the arrest and commitment of any person charged with an offence triable under the act, notify the district attorney.

The title of the act indicates its object, which is to provide for the trial of all offences where the penalty is not necessarily imprisonment at hard labor or death. The several sections of the act, as we have stated, are responsive to the title. The section of the act which makes it the duty of the sheriff to notify the district attorney of all persons charged with such offences, who are under arrest, does not limit his authority to file informations only against those whom the sheriff holds in custody.

The intention of this section was that the district attorney should be so notified in order that he might proceed at once to file the information required by the act, and the sheriff's duty imposed by the act was merely to aid and assist the prosecuting officer in the discharge of his duty. The information was filed by the district attorney on his oath of office. While it is usually filed upon knowledge given by some other person than the district attorney, in this State he can file it on information originating with himself. The act authorizes him to file informations for offences described in the act with the clerk of court, and to have the same validity as if filed in open court. It is clearly the meaning and intendment of the act that the information could be filed with the clerk when the court was not in session, as the act authorizes the judge to order a special jury to be drawn to try such offences at other than regular jury terms.

The information is clothed with all the regularity as though filed in open court. Its validity as to form and substance is not questioned. The proceeding instituted by the district attorney was authorized by the act and he has literally followed its requirement.

Judgment affirmed.

No. 1274.

THE STATE OF LOUISIANA VS. W. A. JACKSON.

Same as in case of State vs. Jackson, 1273.

APPEAL from the Third District Court, Parish of Union. *Barksdale, J.*

J. D. Everett, District Attorney, and *M. J. Cunningham*, Attorney General, for the State, Appellee.

Kidd & Van Hook for Defendant and Appellant.

The opinion of the court was delivered by

MCENERY, J. The defendant was tried on an information filed in the office of the clerk of the District Court, and, in accordance with provisions of Act 35 of 1880, convicted and sentenced to pay a fine of over three hundred dollars. He appealed.

He filed a motion for a new trial and in arrest of judgment.

The motion for a new trial is based on alleged errors of the trial judge on sustaining peremptory challenges by the State to certain jurors, and to the charge of the court "that all parties aiding or abetting in any manner, for any purpose, or for no purpose, any person retailing spirituous liquors without a license, was equally guilty as the actual owner of the liquors, and that said charge was misleading," etc. There were no exceptions taken at the time and bills reserved to the ruling of the trial judge. We can not therefore notice these alleged errors referred to and embraced in a motion for a new trial for the first time. We may add, however, that there is no force in the motion and that it is entirely without merit.

The matter urged in the motion for arrest of judgment is identical with the issues presented in a like motion in the case of State vs. Jackson, No. 1273, just decided.

For the reasons in that case and those herein assigned, the judgment appealed from is affirmed.

No. 1275.

THE STATE OF LOUISIANA VS. C. D. COVINGTON. 45 979 50 1139

A juror who states that he has formed an opinion as to the guilt of the accused from talking with a witness for the State, but that he can disregard that opinion and render a verdict in accordance with the law and the testimony adduced on the trial, is a competent juror. State vs. Dugay, 35 An. 327, affirmed.

In a motion for a new trial the unsworn statement of the accused as to newly discovered evidence is not sufficient. It must be corroborated. The granting of new trials is largely within the discretion of the trial judge, which will not be disturbed unless manifestly erroneous. State vs. Washington, 36 An. 341, affirmed.

APPEAL from the Third District Court, Parish of Union. *Barksdale, J.*

J. D. Everett, District Attorney, and *M. J. Cunningham*, Attorney General, for the State, Appellee.

Defendant *in propria persona*.

The opinion of the court was delivered by

MCENERY, J. The defendant was indicted for the offence of retailing intoxicating liquors without a license, convicted, and fined the sum of $310. He has appealed.

He complains of the impaneling of an incompetent juror and the overruling of his motion for a new trial on the ground of newly discovered evidence.

The juror against whom the objection is urged answered on his *voir dire* and stated that he had formed an opinion from conversing with one of the witnesses for the State, but that he could lay aside the opinion he had formed and decide the case on the law and the evidence adduced on the trial. The defendant had exhausted his challenges when he challenged the juror for cause, which was overruled.

The answer of the juror disclosed that he was a competent juror, that he was free from bias or prejudice and his mind in that condition to impartially try the defendant.

In case of State vs. Dugay, 35 An. 327, this court said: "Our last researches on this point were suggested in the case of State vs. Rance, 34 An., p. 186, in which we took occasion to make a thorough

review of previous opinions on this subject and in which we reaffirmed the rule sanctioned in numerous cases, under which jurors who had formed and expressed opinions as to the guilt or innocence of the accused, but who asserted that they felt able to do impartial justice according to the law and the evidence in the case, were ruled to be competent jurors. We now distinctly and emphatically reiterate that this is the correct rule, with the reasonable hope that it will be clearly understood by the profession." State vs. Dent, 41 An. 1083; 40 An. 740; 42 An. 255; 43 An. 365.

The answer of the juror brings him within the ruling of the cases cited.

The motion for a new trial on the ground of newly discovered evidence is supported only by the unsworn statement of the defendant. The mere statement of the accused that he did not know of the testimony is insufficient. His statement must be corroborated. The object of the new evidence was to show that the defendant had sold the whiskey six months before the filing of the bill. This was a fact within his own knowledge, and therefore no ground for a new trial, as he could have stated the fact as a witness.

The granting of new trials is largely within the discretion of the trial judge, and will not be disturbed unless manifestly erroneous.

The other ground, that the juror, Manning, was a nephew of the witness upon whose testimony the conviction was had, is without merit.

Judgment affirmed.

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No. 1271.

THE STATE OF LOUISIANA VS. JOHN CLIFFORD.

Where a party has been prosecuted by the municipal authority of the city for fighting and disturbing the peace; this is no bar to a prosecution for the same offence by the State.

The statement of the judge copied in the bill of exceptions is not questioned; if it were it would not avail the defendant in his defence, for this court will not review the evidence in the record to determine whether the venue of the crime was proved.

APPEAL from the Criminal District Court for the Parish of Orleans. *Moise, J.*

J. P. Madison, District Attorney, for the State, Appellee.

John C. & Chas. A. Wickliffe for Defendant and Appellant.

The opinion of the court was delivered by

BREAUX, J. The defendant was found guilty of assaulting and beating one Lilly Jane Clifford, and condemned to suffer imprisonment for the term of one year, or to pay a fine of $350.

From the sentence and judgment he appeals.

In the lower court he waived trial by jury and was tried by the judge.

His grounds of appeal are:

1. That the court *a qua* erred in overruling his plea of *autre fois acquit.*

2. That there was a total failure on the part of the State to prove the venue as laid in the indictment.

For the purpose of sustaining the plea of *autre fois acquit* the defendant proved that prior to the filing of the information against him he was prosecuted in the first recorder's court for violating ordinance No. 3121 C. S. of the city of New Orleans by fighting and disturbing the peace.

That he was found not guilty and discharged.

That the assault and battery for which he was found guilty in the District Court is that of which he was found not guilty in the recorder's court.

Though the decisions are not uniform the clear weight of authority sustains the proposition that an act may be a penal offence under the laws of the State and may also be subject to a penalty by the municipal authority.

Certain trustworthy authorities hold that there is more safety to the community in two conservators of the peace than in one, and that the same act may be an offence both, against the State and the municipal corporation, and that both may be punished without any violation of constitutional principle.

Others make a distinction between the judiciary power and the police power.

The same state of facts may constitute separate offences—one punishable under the grants of power to the municipal corporation, the other punishable under the laws of the State. It is a matter within the control of the Legislature and may be regulated under constitu-

tional limitations, according to the exigencies of the various municipalities of the State.

In view of the necessity of maintaining peace and good order within the limits of the municipality, acts of incorporation are adopted granting needful powers.

The recorders have the right to arrest and punish offenders against the corporation.

The offence referred to above is deemed an offence against the right of the corporation, for which fine or imprisonment may be imposed, and in thus punishing, it is the particular offence against the corporation that is punished, and not the act of assault and battery denounced throughout the State.

The article of the Constitution ordaining that no person shall be twice put in jeopardy of life or liberty for the same offence was not intended to apply to trial under corporate proceedings for wrongs done and the violation of ordinances adopted with the view of maintaining peace and security under corporate authority, so as to operate a bar to a prosecution on the part of the State.

The purpose of the ordinance was not to punish for any offence against the criminal justice of the country, but to maintain due regulation as an incident of the existence of the corporate organization.

In reference to the distinction between the judiciary power and the police power, it appears to be retained in certain respects, both in the Constitution and under the charter of the city.

The police power delegated to the corporation is distinguished from the regular judiciary power of the State.

The General Assembly may provide police courts with authority to enforce municipal ordinances, and the city of New Orleans has the right to appoint the several public officers necessary for the administration of the police of the city. Articles 136 and 253.

In legislating under the authority of these articles, the General Assembly delegated the power to the City Council and made it "their duty to pass such ordinances and to see to their faithful execution as may be necessary and proper to preserve the peace and good order of the city." Sec. 7 of Act 20 of 1882.

But the control of the municipality is not exclusive.

The control of the State law upon the subject is not in any respect superseded.

Not being inconsistent, each stands and is to be enforced.

This point received careful consideration in the case of State of Louisiana vs. M. Fourcade, recently decided, and was overruled.

We are confirmed in the correctness of the views expressed in that decision.

PROOF OF VENUE.

The judge, by his recital of the facts in the second bill of exceptions, states that the venue was proven.

The defendant's objections are that the evidence was not such as to prove the venue of the crime.

If we were not satisfied of the proof, and that the objection is unfounded, the defendant's ground to set aside the action of the court *a qua* could not be sustained, for it is no longer an open question; this court will not review the evidence in the record to determine whether the venue of the crime was proven or not. State vs. Turner, 38 An. 307; State vs. Alex. Starks, 42 An. 316; State vs. Nettles, 41 An. 323.

The judgment is affirmed.

No. 1278.

ISAAC FREIBERG & BRO. AND OTHERS VS. A. LANGFELDER.
MRS. PAULINE, INTERVENOR.

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While we have recognized the practice, in cases of ambiguous jurisdiction, of taking appeals at the same time from District Courts to the Circuit Courts of Appeal and to this court, parties availing themselves of this privilege subject themselves to the risk that if the first appeal shall not be determined by the court in which it is lodged prior to the return of the second appeal, the latter necessarily lapses.

It is a legal impossibility that there can be two appeals, by the same party, from the same judgment, pending at the same time in two different courts.

The Circuit Court to which the first appeal was returned had exclusive authority to determine primarily its jurisdiction over the appeal, and until it has declined jurisdiction or has been denied jurisdiction under an appeal to the supervisory jurisdiction of this court the pendency of the appeal is a bar to the prosecution of an appeal, involving the same subject matter, to this court.

Appellees who are held in the Circuit Court under the appeal still pending there, can not be, at the same time, impleaded in this court under the second appeal.

Appeal dismissed without prejudice to right of new appeal in case the Circuit Court shall decline or be denied jurisdiction.

APPEAL from the Fifth District Court, Parish of Ouachita.
Richardson, J.

Gunby & Sholars for Plaintiffs and Appellants.

Boatner & Lamkin for Intervenor, Appellee.

Stubbs & Russell for Defendant.

The opinion of the court was delivered by

FENNER, J. The several plaintiffs in these cases having encountered adverse judgments in the court below, and being, as we suppose, in doubt as to whether the cases were within the appellate jurisdiction of the Circuit Court of Appeals or of this court, applied for and obtained, at the same time, two orders of appeal, one to the Circuit Court returnable on the *first* Monday of June, 1893, and the other to this court on the *second* Monday of June, 1893.

A motion to dismiss filed by appellee brings to our notice the fact (admitted by appellants) that the first appeal was duly lodged in the Circuit Court and was pending in said court undetermined at the time when the appeal was filed in this court, and still remains undetermined.

In consideration of the double appellate jurisdiction granted to the Supreme and to the Circuit Courts over District Courts and of the uncertainty which sometimes attends the determination as to which is the proper appellate tribunal, we are disposed to recognize the practice which seems to prevail, in ambiguous cases, of taking, at the same time, orders of appeal to both appellate courts.

In the case of Bennett vs. Creditors, decided at this term, where appeals had been taken both to the Circuit Court and to the Supreme Court, and where the appeal to the Circuit Court had been dismissed for want of jurisdiction before the appeal to this court had been filed here, we declined to dismiss the latter appeal, saying: "The first appeal prosecuted was a nullity, and the second, valid and legal. It was in force and could be prosecuted in accordance with the order granting it. Because the other order obtained at the same time was null and void, it could not affect the order of appeal made returnable to this court."

If this case stood in like position we should pursue the same course. But the case before us is essentially different. We are con-

fronted with the fact that the appeal taken to the Circuit Court was duly prosecuted and had been lodged in that court before the appeal was returned in this court and is still pending there undetermined.

Is it possible that there can be two appeals by the same party, from the same judgment, pending, at the same time, in two different courts? We can discover no warrant of law for such a proposition. It may be that the appeal to the Circuit Court may be nugatory as not within its jurisdiction, and that the Circuit Court may so decide and dismiss that appeal as it did in the Bennett case. But the Circuit Court is vested with unquestioned and exclusive authority to determine primarily the question of its jurisdiction over the appeal. When it has decided, resort may be had to our supervisory jurisdiction to compel or forbid it to entertain jurisdiction; but we have universally declined to exercise our supervisory powers until the question of jurisdiction has been first submitted to and decided by the Circuit Court. For us to entertain jurisdiction of the appeal to this court would be, in effect, to order a dismissal of the appeal to the Circuit Court in advance of any determination by that court of its own jurisdiction. The two appellate jurisdictions are exclusive of each other. If this court has jurisdiction the Circuit Court can not have it—at least over the whole judgment, and both appeals are taken from the whole judgment without discrimination. Appellants have themselves invoked the appellate jurisdiction of the Circuit Court and they must submit to that jurisdiction until it has been determined in proper proceedings and by proper authority that the Circuit Court has no jurisdiction. Then, and not till then, can they appeal to this court. We can not, in this case, decide that the Circuit Court has no jurisdiction of an appeal regularly taken and pending before it; and it is impossible for us to entertain this appeal without so deciding.

It is, no doubt, unfortunate for appellants that their two appeals thus find themselves in conflict. But it was a risk that they assumed when they took the two appeals, that if the first appeal was not disposed of before the return day of the second the latter would necessarily lapse. It is a legal impossibility that they should bring their second appeal to this court while their first appeal is still pending undetermined in the Circuit Court. It does not lie in the mouths of appellants to question the jurisdiction of the Circuit Court which they have themselves invoked. Their adversaries may question it,

and if they do so successfully appellants may then invoke the jurisdiction of this court, but so long as the appellees are held under the appeal in the Circuit Court they can not be impleaded in this court under an appeal by the same parties from the same judgment.

We have reflected on appellant's dilemma from every point of view without being able to discover any alternative except to dismiss the appeal. In doing so we shall reserve their right to take a new appeal to this court in case the Circuit Court shall be held to be without jurisdiction.

It is therefore ordered that this appeal be dismissed without prejudice to appellant's right to take a new appeal to this court in case the pending appeal to the Circuit Court of Appeals shall be dismissed for want of jurisdiction.

ON APPLICATION FOR REHEARING.

WATKINS, J. Counsel for appellant insist that in dismissing defendant's appeal our opinion runs counter to the Constitution and law—relying on Henry vs. Tricou, 36 An. 520, and supported by an elaborate and extended argument.

We will premise these remarks by stating that the *dicta* announced in Henry vs. Tricou has been called to our attention for the first time in this application. It certainly is in conflict with our ruling in this case; but we feel bound to overrule that decision. It is couched in dogmatic terms, unsupported by thoughtful reasons and has not been followed by confirmatory precedent.

With the utmost desire to preserve uniformity in the rulings of this court, especially upon points of practice, a hasty departure from sound and logical principles ought not to compel us, in the language of Chief Justice Black "to stumble again, every time we come to the place where we stumbled before."

We note the statement on the application to the effect that our opinion is slightly in error in saying "that the appeal taken to the Circuit Court *had been lodged* (our italics) in that court before the appeal was returned into this court," etc., counsel's insistence being that the record shows that orders of appeal were simultaneously granted, and appeal bonds to this court and the Circuit Court simultaneously filed—thus vesting jurisdiction in each of said courts simultaneously.

On this hypothesis counsel say:

"Then it necessarily follows that the *appeal was lodged* in the Supreme Court at the same time and in the same manner that it was lodged in the Circuit Court," etc.

While the filing of the appeal bond certainly divests the jurisdiction of the court of first instance, and, presumably at least, vests the appellate court with jurisdiction, yet the appellate court is fully vested with the power of determining *when* an appeal is properly brought before it. No other court or tribunal is competent to do so. And in order to determine that question in this case, we think we must examine and be controlled by the order of appeal. Looking into the order of appeal, we find that the Circuit Court appeal was made returnable on the *first* Monday in June, 1893, while the appeal taken to this court was made returnable to this court on the *second* Monday in June, 1893, just a week later.

If the appellants pursued the tenor of this order of appeal, and filed a transcript in each one of the appellate courts on the respective return days, it is evident that, as our opinion states, "the appeal taken to the Circuit Court *had been lodged in that court before* the appeal was returned into this court."

The clerk's endorsement on the transcript shows same to have been filed on June 13, 1893, which was the second day of the present term, or eight days subsequent to the return day of the appeal in the Circuit Court. Appellee's motion to dismiss appeal was filed in this court on June 14, and the case was argued and submitted on that day.

To this motion is appended the certificate of the clerk to the effect that the appeal had been prosecuted to the Circuit Court and that the case had been argued and submitted in said court and was at the time under advisement by the judges thereof. It is manifest that the statement of our opinion was strictly correct.

In our opinion appellee's motion does not involve a question of jurisdiction, but the question of the appellant's *right* to bring up an appeal to this court during the pendency of another appeal in the Circuit Court. If this court should proceed with the case and decide it, we might be confronted with a different judgment rendered by the Circuit Court. True it is that the Circuit Court might, through courtesy, suspend its judgment so as to conform to our own. But there is no assurance of that course being pursued, nor could this court expect the Circuit Court so to do.

But this is an argument *ab inconvenienti*. The proposition of appellant's counsel involves the philosophical impossibility of two bodies occupying the same space at the same time.

There can not be such a thing as a suit being in two courts at one and the same time.

This the appellant has attempted to do, and we simply decline to take cognizance of the appeal he has lodged in this court, *since* his appeal in the same case was lodged in the Circuit Court.

We have gone very far—possibly too far—in permitting such radically inconsistent pleading as the taking of two self-contradictory orders of appeal from the same judgment, to two different courts, at the same time. No express provision of law sanctions such a practice, and we have given it our approval only to relieve parties from the responsibility of deciding, in advance, doubtful questions of jurisdiction; and to relieve them from the unfortunate consequences resulting in case the order of appeal first returned and presented for action should be annulled for want of jurisdiction.

In that case the second order of appeal would remain in force and might be prosecuted without encountering any conflict of jurisdiction. But to claim that a party who has lodged and is actually prosecuting an appeal in the Circuit Court can afterward, and while that appeal is still pending, return into this court another appeal, identical in every respect, is to demand what we characterize as a "legal impossibility"—and we can not demonstrate this more completely than was done in our original opinion.

Rehearing refused.

No. 1269.

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A. B. AUSBACHER & CO. vs. EDWARD DE NEVUE.

1. Where a party has removed from one parish to another, but has not made a formal declaration of his intention to change his domicil, if a year has not elapsed since his removal it is optional with a party desiring to sue him to bring the suit in either parish.
2. In cases of ambiguous domicil a presumption attaches in favor of the continuance of the former domicil, and if a party so acts as to leave it doubtful in which of two places he resides, parties interested may sue him at either.

APPEAL from the Fifth District Court for the Parish of Ouachita *Richardson, J.*

Potts & Hudson for Plaintiffs and Appellants.

Chas. T. Madison, Curator ad hoc, for Defendant and Appellee.

The opinion of the court was delivered by

FENNER, J. This is an attachment suit brought against the defendant under paragraphs 1, 4 and 5 of the Code of Practice. A curator *ad hoc* was appointed to represent the absent defendant, who appeared and filed an exception to the jurisdiction of the court on the ground that the defendant was domiciled in the parish of Orleans, and had been for two years prior to the institution of the suit, and that he had not left the State permanently, and had no intention of doing so.

Judgment was rendered sustaining this exception and dismissing the case as of non-suit, from which judgment the plaintiffs appeal.

The evidence certainly fails to establish that defendant has left or intends to leave the State permanently, but notwithstanding this, the suit may stand on the grounds of fraud alleged if the defendant was legally suable in the parish of Ouachita. The proof fully establishes that defendant had been, for many years, domiciled and doing business in the parish of Ouachita. This suit was brought on May 31, 1892, and it is clearly shown that defendant was then domiciled in the parish of Orleans, but the fact does not suffice to defeat the jurisdiction of the Ouachita court.

Art. 167, C. P., declares: "If the defendant change his domicil, he must be cited in the parish where he has resided within the last year or within that where he has declared, in the manner prescribed by law, that he intended to have his domicil."

It is admitted that defendant has never made or filed any declaration in the manner prescribed by law of his intention to change his domicil from the parish of Ouachita to the parish of Orleans. Unless, therefore, the defendant had actually resided in New Orleans for a full year prior to the institution of this suit, plaintiffs had the undoubted right to sue him in the parish of his former domicil. The jurisprudence of this court to that effect is emphatic and unequivocal.

In Berry vs. Gaudy, 15 An. 533, the Supreme Court said: "Where a party has removed from one parish to another, and has

acted in the latter parish in such a manner as to manifest sufficiently his intention to change his domicil, but has not made a formal declaration to that effect, if a year has not elapsed since his removal it is optional with a party desiring to sue him to bring the suit in either parish.

"If a person wishes to protect himself from being sued in the parish from which he has removed, he should make an express declaration of his intention to change his domicil."

In King vs. Watts, 23 An. 563, the same doctrine was held as correctly expressed in the following language of the syllabus: "If a party has acquired a domicil in one parish and removes therefrom to another parish, he may be sued and cited in the parish of his former domicil within one year after his removal therefrom, unless he has, by public declaration in the manner provided by law, declared the place of his domicil."

To same effect, see:

State ex rel. vs. Steele, 33 An. 910; also, 23 An. 516, 20 An. 246, 12 La. 190, 8 La. 213, 4 N. S. 51.

Such is the unambiguous precept of the law, and no gloss could either make it clearer or impair its binding force.

The case then pivots upon a single and simple question of fact, viz.: had defendant changed his domicil from Monroe to New Orleans more than one year prior to the institution of this suit on May 31, 1892?

We have critically examined the evidence on this point. The curator introduced much evidence, very clearly establishing defendant's domicil in New Orleans, but the only testimony which fixes a date prior to May, 1891, is that of the two ladies keeping the house in which he boarded in New Orleans, and their evidence on that point is contradicted, not only by several witnesses for plaintiffs, but by two of defendant's own witnesses. The evidence, as a whole, satisfies us that while defendant no doubt conceived the idea of removing to New Orleans and began to take steps to that end, in or before May, 1891, he did not actually make his permanent removal before October of that year. If he kept a boarding place in New Orleans, he also retained one in Monroe up to October. The evidence leaves no doubt in our minds on this point, but even if it were doubtful, defendant's conduct would at least subject him to the application of the principle announced in Art. 38, Rev. C. C.: "If he resides alternately in several places and nearly as much in one as in another,

and has not declared his intention in the manner hereafter prescribed, any one of said places may be considered as his principal establishment, at the option of the persons whose interests are thereby affected."

This principle is further strengthened by the presumption which, in cases of ambiguous domicil, attaches in favor of the continuance of the former domicil.

Under the evidence presented in this case we think it quite clear that plaintiffs had the right to conclude that defendant's domicil in Ouachita parish had certainly continued up to less than one year prior to their suit, and, therefore, that they had the right to bring their action in that parish.

It is is therefore adjudged and decreed that the judgment appealed from be avoided and reversed, that defendant's exception be now overruled and that the case be remanded to the lower court for further proceedings according to law, defendant to pay costs of exception and of this appeal.

Judgment reversed.

Justice McEnery takes no part.

ON APPLICATION FOR REHEARING.

The question of the validity of citation and service is not involved in this appeal, which is taken solely from a judgment on an exception to the jurisdiction of the court. The remarks on the citation in this application are entirely foreign to the issue before us.

Rehearing refused.

No. 1267.

W. B. THOMPSON & CO. VS. MRS. M. D. HERRING, ADMINISTRATRIX.

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1. A party holding an authentic deed of sale, perfect on its face, executed by the decedent, is not required to stand by and see the property sold at judicial sale as the property of the vendor's succession under an order of sale provoked by his administratrix which could only be sustained by proof that the sale was a pure simulation. He may rightfully enjoin such a sale.
2. The allegations of the administratrix that the price of the sale was not paid, and that the thing sold had not been delivered, do not necessarily import the nullity of the sale. C. C. 2456.
3. If the act of sale evidenced a real transaction, whatever its character, the administratrix could not ignore it or attack it collaterally, but could only claim its judicial revocation by direct action.

4. As between the parties, the verity of authentic sales can only be assailed by a counter-letter or by answers to interrogatories on facts and articles.
5. The letters of plaintiff's produced as the equivalent of a counter-letter do not evidence an acknowledgment that the sale was a simulation, but, on the contrary, assert that it was real and based on valuable consideration.

APPEAL from the Sixth District Court, Parish of West Carroll. *Ellis, J.*

Wells & Wells for Plaintiffs and Appellants:

The administratrix represents both the creditors and the heirs. 35 An. 1010.

A real sale can not be attacked by creditors except by a direct action. 39 An. 488 and authorities cited.

Parties and their heirs and assigns can only assail the validity of an authentic act by a counter-letter or answers to interrogatories on facts and articles. 42 An. 735 and authorities cited.

Agreements legally entered into have the effect of law on those who have formed them, and can not be revoked by the parties except by mutual consent. C. C., Art. 1901. Therefore, a vendor by authentic act can not illegally take possession of the thing sold and force the vendee to allege and prove that it was not a sale.

C. T. Dunn for Defendants and Appellees:

The payment of the purchase price in a sale made for cash is the principal thing. Delivery completes the sale. If the purchase price is not paid, and there is no delivery of the property sold, the sale is incomplete. There is no sale. C C. 2487, 2549; 13 An. 340; 18 An. 31; 36 An. 194; 24 An. 370; 19 An. 164.

Where it appears that the consideration of a contract has failed a true and sufficient consideration may be shown. An unliquidated account for $1307 is vile and insufficient to compensate a $2500 cash consideration in the act of sale. 32 An. 432; C. C. 1900; 40 An. 308; 30 An. 966; 34 An. 688.

A contract clothed in the form of a sale can not be construed as a mortgage unless such is the clear intent of the parties. The debt held to be secured must be identified with the written act. If such debt is not mentioned in the written act it holds no mortgage. 40 An. 310; 30 An. 966.

The letters and other writings of a party to a suit are admissible against him. The testimony furnished by such writings are concurrent in dignity and in legal effect with answers of the party to interrogatories on facts and articles. 11 An. 118; 12 An. 739.

Parol testimony is admissible to prove that the terms of a written act of sale have not been complied with, such as that the purchase price has not been paid and that the property sold has never been actually delivered to the purchaser. Facts of this character can only be proved by parol. 15 L. 311; 32 An. 432; 38 An. 1033; 36 An. 870, 549, 509, 118; 40 An. 336; 26 An. 545; 22 An. 381; 27 An. 626; 31 An. 262; 3 An. 330; 13 An. 340; 29 An. 495; 30 An. 966, 1125; 2 An. 480; 35 An. 547; 38 An. 736; 9 An. 29; 19 An. 164; 1 Greenleaf, Secs. 284, 304, 306.

An injunction dissolved plaintiff (liable in damages) may waive suit for damages on the injunction bond. He may submit the question of damages to be determined in the original injunction suit.

Illegal testimony received on the trial without objection will be considered by the court.

Testimony to prove damages introduced on the trial without objection submits the question of damages to be determined in the original injunction suit. 20 An. 739; 2 L. 860; 24 An. 370.

The opinion of the court was delivered by

FENNER, J. On the 3d day of March, 1890, John S. Herring executed an authentic act, by the terms of which he sold to plaintiffs several tracts of land for the price of $2500 cash, receipt of which is acknowledged in the deed. The act contained a stipulation that the vendor should have the right to take back the property within one year, and binding the vendees to reconvey on repayment to the latter of the sum of $2500, with interest, together with all sums which shall be expended by the purchasers for taxes, insurance and incidental expenses connected with said property. This act was duly recorded. Herring died shortly after the sale. His succession was opened and his widow was qualified as administratrix. She caused the property to be inventoried as property of the succession, and provoked an order of sale thereof, under which it was advertised to be sold on April 15, 1893.

Thereupon the plaintiffs brought the present suit, in which they set forth the authentic sale to them and their ownership in virtue thereof, charge the acts of the administratrix in causing the property to be inventoried and her proceedings for the sale thereof are wrongful and illegal, and injurious to them, and pray for a writ of injunction prohibiting and restraining her from proceeding further with said sale until the further orders of the court, and for judgment perpetuating said injunction.

The answer of the administratrix denies the ownership of plaintiffs, sets forth that the sale to them was "never legally completed, for the reason that they never paid the price, that the acknowledgment of the receipt of $2500, as expressed in the deed, is not true; that Thompson & Co. never had actual delivery of the property, but the same has been and now is in the possession of defendant as legal representative of Herring's succession; that plaintiffs have repeatedly acknowledged since said deed was executed that the ownership of the property is in the succession; that plaintiffs have shown no legal cause for injunction, and have wantonly

abused that equitable remedy"—and she prays for dissolution of the injunction with damages.

Judgment was rendered dissolving the injunction, with $100 damages, and authorizing the administratrix to proceed with the sale; from which judgment this appeal is taken.

It seems to us very clear that upon the face of the title conferred on them by the authentic act of sale plaintiffs were not bound to stand by and see that title ignored and the property conveyed thereby sold at a judicial sale as the property of another, and that they were fully authorized to enjoin such proceedings, which could only be sustained on clear proof that the sale was a pure simulation. If the sale were a real transaction, whatever its character, the administratrix would be bound to secure its judicial revocation on compliance with whatever obligations it might impose, before she could lawfully disregard it and sell the property as that of the succession. Lawler vs. Cosgrove, 39 An. 490. The allegations in the answer that the price had not been paid and that there had been no delivery of the thing sold do not necessarily import the nullity of plaintiff's title. The Civil Code, Art. 2456, expressly declares: "The sale is considered to be perfect between the parties and the property is of right acquired to the purchaser, with regard to the seller, as soon as there exists an agreement for the object and for the price thereof, although the object has not yet been delivered nor the price paid."

The articles of the code—2487 and 2549—referred to by defendant's counsel do not conflict with this principle, but only import that the buyer, who has not paid the price due under the terms of the sale, can not enforce delivery of the thing. The plaintiffs here do not demand delivery of the property, but simply that their title under the authentic act be respected until revoked by proper judicial proceedings.

Has the defendant proved that the sale is a simulation? We think not. We said in a recent case: "It is hornbook law in our jurisprudence that the verity and reality of authentic sales can be assailed by the parties thereto only in two ways, viz.: first, by means of a counter-letter; second, by the answers of the other party to interrogatories on facts and articles," and we cited the numerous authorities to that effect. Godwin vs. Neustadt, 42 An. 738.

Defendant did not undertake to probe the conscience of plaintiffs,

nor does she produce any formal counter-letter; but she invokes the rule that letters and written acknowledgments of a party are in the nature of a counter-letter and are entitled to like effect, and she prodnces certain letters written by the plaintiffs to her attorneys in this case, which we have carefully considered.

The first acknowledges a letter received from defendant's attorney and encloses an account against J. S. Herring for moneys advanced before the date of sale and for taxes and insurance paid on the property since the sale amounting to $1807.43, and then proceeds: "This is the amount due us. It is true that at one time we did agree to take $600 for our claim and the taxes to be returned to us. We made this proposition with the understanding that the $600 was to be paid at once, but Mrs. Herring did not accept the proposition and we shall now expect the entire amount due us paid before we relinquish our claim on the property."

The second letter is dated December 21, 1892, and says: "We have received your favor of the 19th inst., and trust that a speedy adjustment of the Herring succession can be had. We are certainly not going to stand in the way, and the only thing that we desire is a recognition of our claims in account. We have no objection to Mrs. Herring selling the property provided our account is paid, and we, some time ago, made a still better proposition to Mrs. Herring, in effect that we would take less for our account than its face value. * * * We trust that you will be able to have Mrs. Herring sell the property and pay us our claim. We have no desire to press Mrs. Herring in the matter, but we accepted title to the property in perfect good faith for money advanced, and we think that our claim should have had more attention than has been accorded it heretofore."

We can discover, in these letters, no acknowledgment that the sale was, in any sense, a simulation. On the contrary they assert that the sale was made in good faith for money advanced, and while acknowledging impliedly that the whole price had not been advanced as recited in the deed, they substantially claim that the amount due on the account was accepted as a partial payment and must be repaid before they would relinquish their title to the property. They simply evince the willingness of the plaintiffs to forego their rights under the sale, and to permit the administratrix to take back and sell the property for account of the succession provided they were made whole by payment out of the proceeds of their account and expenses.

The reality of the transaction is further shown by the admission that after the sale the property was assessed to plaintiffs and that they paid the taxes for the years 1890, 1891 and 1892.

The plaintiffs were not bound to establish more particularly, in this case, the precise character and circumstances of the transaction. They stood on their authentic title, which by itself was a sufficient ground for the relief sought, unless defendant could destroy it by proving in the manner provided by law that it was a mere simulation, which she certainly has not established.

The administratrix was permitted to testify over the objection of plaintiffs' counsel to interviews with one of the plaintiffs, and she herself admits that "he said he did not consider that the property belonged to the succession." She adds: "I claimed that it did for the reason that W. B. Thompson & Co. had never paid the purchase price for said property. I told him that I would recognize his claim as a mortgage up to the amount I understood to be due him, which amount I understood to be $650 and the taxes paid on said property."

The plaintiffs admitted and announce in this court their willingness to permit the sale to proceed provided their claim be ordered paid out of the proceeds. There thus seems to be no substantial dispute between the parties except as to the amount due. Plaintiffs' account has not been proved in this case; but we think a judgment authorizing the sale to proceed and recognizing the right of plaintiffs to be paid by preference out of the proceeds of sale, the amount of their claim to be established contradictorily between the parties, would promote a speedy settlement and advance the interests of justice.

It is therefore adjudged and decreed that the judgment appealed from be amended so as to reverse and set aside the allowance of damages against the plaintiffs and so as to recognize the right of plaintiffs to be paid by preference out of the proceeds of sale of the property; the amount due them on their account for moneys advanced and for taxes, insurance and expenses, the amount and verity of said account to be established contradictorily between the parties by judgment of the court and a sufficient amount of said proceeds to be retained to satisfy the said judgment when rendered, and that, in other respects, the judgment appealed from be affirmed; defendant and appellee to pay costs of this appeal.

ON APPLICATION TO AMEND DECREE.

The motion to amend can not be granted.

The reasoning of the opinion entitled the plaintiffs to an absolute reversal of the judgment appealed from, and the qualified decree rendered was based exclusively on the consent of plaintiffs, and in the supposed interest of the defendant that the sale should be proceeded with. At the time of adopting the decree the court agreed that if defendant should complain and apply for rehearing it should be granted and a decree rendered reversing the judgment and perpetuating the injunction.

As defendant applies simply for an impossible amendment, inconsistent with the consent of plaintiffs, the application must be denied.

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No. 1279.

YALE & BOWLING IN LIQUIDATION VS. BOND & WILLIAMS.

OPPOSITION OF GILKESON-SLOSS COMMISSION COMPANY.

In case a judgment creditor causes property standing in the name of another to be seized and advertised for sale as that of his judgment debtor, he undertakes the burden of proving the title of such third person to be a simulation.

But if such third person's title emanates from the judgment debtor, who is suffered to retain *actual* possession, under a precarious title, there is reason to presume the sale is simulated, and the burden of proof is on such purchaser to show that the transaction was in good faith and establish the reality of the sale.

In this latter event the burden of proof is sufficiently discharged by the production of a judicial title supported by confirmatory and corroborating circumstances of contemporaneous date.

APPEAL from the Fifth District Court, Parish of Morehouse. *Richardson, J.*

Boatner & Lamkin for Plaintiffs and Appellants.

Newton & Cason and *Ellis & Hall* for Third Opponents and Appellees:

In an opposition by a third person claiming property seized, the only issue raised by him is the fact of ownership. 12 An. 341; 15 An. 136.

The only question that can be raised by a party when enjoined, who has caused a direct seizure of certain property in the hands of a third person, is simulation of the title by which it is held. A real title, however fraudulent, can not be thus collaterally attacked. It must be previously set aside and annulled by a direct action before a seizure can be legally effected. 5 M. N. S. 361; 30 An. 373; 31 An. 862; 38 An. 248.

Yale & Bowling vs. Bond & Williams.

On questions of fact the Supreme Court will not disturb the judgment of the lower court—unless manifestly unjust and erroneous.

A strong case made out by plaintiff must be overcome by defendant. This can not be done by conflicting evidence tending to show fraud or simulation. 33 An. 801; 34 An. 310.

When plaintiff alleges ownership and the title by which the same was acquired, simulation must be specially pleaded by the defendant on whom devolves the burden of proving it. 7 M. 221; 1 An. 262; 2 An. 354; 3 An. 325; 32 An. 1132.

There are two ways by which a title to specific property can be attacked on the ground of simulation. 1. By a direct action "*en declaration de simulation.*" 2. By a direct seizure. Between the two there is no material difference. The object is the same in both.

A test as to the correct application of the exception of "*res adjudicata*" is by inquiry as to what was litigated and adjudicated in the prior case, and whether the same matters and questions are again agitated between the same parties in the same capacity. *Exceptio rei judicatæ obstat quoties inter easdem personas eadem quæstio revocatur vel alio genere judicii.* C. C. 2286; 19 L. 325; 28 An. 619; 109 N. Y. 202; 24 Neb. 643.

It matters not whether by petition, exception, intervention or rule the same question has arisen between the same parties, the exception of "*res adjudicata*" bars another contest over it. 30 An. 521; 31 An. 468; 35 An. 554.

The burden is on defendant to prove special defences alleged by him.

The opinion of the court was delivered by

WATKINS, J. This is a third opposition, coupled with an injunction, restraining sale of certain property that was seized by plaintiffs in execution, as that of defendants' as their judgment debtors, third opponents setting up title thereto and claiming ownership.

On the trial there was judgment in favor of third opponents, decreeing them to be the owners of the property seized, and disregarding the other demands, and the seizing creditors have appealed.

The averments of opponents' petition are, in substance, that the creditors of Bond & Williams, under a judgment for about $2500, caused a certain stock of goods and merchandise to be seized as their property. That same was situated in the town of Bonita, in a storehouse wherein the defendants had carried on a general mercantile business during the year 1891, and is well worth the sum of $4000. That said stock of goods is their property, and was in their possession as such at date of seizure, to the knowledge of the seizing creditors, they having acquired same at a judicial sale made on the 2d of January, 1892, under an order of court made in sundry attachment suits against the defendants, Bond & Williams. That they subsequently engaged Bond & Williams as their agents to take charge of said stock of goods and merchandise, and gave them a special

procuration to that effect. That under said mandate they went into possession for the plaintiffs after the sale, and continued in the charge and management thereof up to the time of the seizure of Yale & Bowling, from time to time replenishing the stock, as occasion required.

Further appropriate allegation is made, as justifying the issuance of an injunction and as entitling them to damages.

The answer of the seizing creditors is, that the pretended agency of the defendants, Bond & Williams, is a fraudulent simulation, intended to screen their property from the pursuit of their creditors, they being notoriously insolvent at the date of said alleged procuration, and the real and actual owners of the property seized.

In the alternative they allege "that if, at the commencement of the business, it was the intention to conduct it as that of third opponents, such intention was abandoned and was treated by third opponents themselves as the property and business of defendants."

Third opponents urge a plea of *res adjudicata* against the charge of simulation in the answer, founded upon the issues raised by Yale & Bowling, in Liquidation, in the suit of Gilkeson-Sloss Commission Company vs. Bond & Williams, Yale & Bowling, in Liquidation, and A. Baldwin & Co., Limited, Intervenors, 44 An. 841, and the judgment therein rendered, wherein the validity of same issues are alleged to have been judicially determined.

It will thus appear that the sole question for our determination is simulation *vel non*—the burden of proof resting on the seizing creditors.

There is no force in the plea of *res judicata*. The suit and judgment on which the plea is predicated was an ordinary attachment suit in which Yale & Bowling, in Liquidation, intervened and resisted the attachment of the property of Bond & Williams, as the common debtors of both parties, on several grounds, and amongst the number that plaintiffs' demand was fictitious, and that the attachment was obtained by consent of the defendants; and that plaintiffs' purchase of the claim of the Monroe banks against the defendants was null and void.

It is quite true that in passing upon the issues thus raised in that case we employed the following language, to-wit:

"From a careful examination of the record we are of opinion that intervenors have failed to prove that plaintiffs and defendants were

guilty of fraud and collusion in issuing attachments against the defendants. The plaintiffs purchased the property under seizure, and agreed to cultivate the plantations and conduct the commercial business in their own names, at $75 per month each; when plaintiffs, from the profits of the business, realized the debt, they agreed to restore the property and business to defendants. The necessities of the creditor and debtor would naturally point to this arrangement."

As is justly observed by the counsel of Yale & Bowling, the foregoing are merely the reasons that were assigned by the court for its judgment rejecting the demands as third opponents and for sustaining the plaintiff's attachment. The title of the plaintiff, as purchaser of the defendants' property *pendente lite*, was not at issue therein, though it was undoubtedly a factor in the conclusion reached by the court; and consequently, same was not directly passed upon, and the judgment thus rendered constitutes no bar to this action—notwithstanding it was this purchase and agency that constituted one of the grounds of attack made upon these proceedings.

In so far as the case of the plaintiffs in injunction are concerned, it is just about as it is stated in their petition, and as announced in the extract we have quoted from the 44th Annual—so far as the face of the papers is concerned. For it appears that, upon application of some of the attaching creditors, the stock of goods in dispute, as well as other properties attached, was advertised and sold under an order of court *pendente lite*, to prevent a loss being sustained by deterioration and waste; and, at the sale thus made, plaintiffs in attachment become the adjudicatees; and the proceeds of sale were distributed ratably and according to the respective privileges of the attaching creditors. The purchasers being creditors for a large amount, and entertaining doubt of collecting their claim, employed their debtors, Bond & Williams, as their agents, as alleged in petition, and turned the stock of goods over to them, as stated in the opinion referred to—hoping that, by this arrangement, they might realize the full amount of their debt. Under this arrangement the defendants conducted the business without interruption or change, until the date of Yale & Bowling's seizure, and against which plaintiffs' injunction is directed.

The proof furnished by plaintiffs in injunction is to the effect that, subsequent to the foregoing arrangement having been made, the mercantile establishment was constantly supplied from their house

in the city of St. Louis; and that the stock of goods that were seized by Yale & Bowling consisted of the old stock that was adjudicated to them and such additions as had thus been made since the time of adjudication. These facts are attested by sundry invoices and bills of lading, and the testimony of the members of the plaintiffs' corporation as well as that of the defendants' firm, notwithstanding the defendant, Williams, stated that *he* considered that the goods belonged to the defendants, because the plaintiffs had charged the *price* to their account. But the statement of Williams is completely overborne by the testimony, oral as well as written, including rendered accounts, which are to the effect that the purchase price of the old stock, as well as the price of the new goods, was charged to the account of Bond & Williams, *agents*. Bond also gave it as his opinion that the goods belonged to the defendants because the profits of the business were applied to the credit of their indebtedness to Gilkeson-Sloss Commission Company. But he was frank enough to admit that, in his opinion, the ownership of the goods was a mooted question. Though it seems quite apparent that his opinion was a *non-sequiter*, as the fact of the profits of the mercantile enterprise being passed to the credit of defendants with Gilkeson-Sloss Commission Company in effect should clearly indicate that they were owners instead of the defendants. He also admits that, in 1892, Bond & Williams, as agents of Gilkeson-Sloss Commission Company, had possession of the storehouse and stock of goods at Bonita—the property in dispute; and were thus in possession at date of the seizure enjoined. That the stock of goods went in the name of Bond & Williams, agents, but that Bond & Williams got the benefit of the profits of the business. That both of the defendants, Bond and Williams, were paid salaries.

He further states that defendants did "the mercantile and planting business in 1892, under the contract as agents for Gilkeson-Sloss Commission Company. That that business extended over in 1893—until the seizure in this case. Gilkeson-Sloss Commission Company furnished nearly all the goods, merchandise, etc., for the Bonita store in 1892, and up to the seizure in 1893."

He gave it as his opinion that upon a fair settlement between the defendants and Gilkeson-Sloss Commission Company in 1893 there would be a small balance due the latter. He states that third opponents advanced the defendants money with which to buy cotton,

and that a disagreement arose between them in reference to the four $1000 drafts that figure in their account, but that, subsequently, credit was given them for $4000 to cover this aggregate amount. He says that defendants' object in conducting the mercantile business at Bonita, under the firm name of Bond & Williams, agents, was "to make money enough to pay up Gilkeson-Sloss Commission Company, and save what they could after paying them up."

Williams, as a witness, puts the case in this way, viz.:

"What property we would have was responsible for the losses of the firm, if there was any, and whatever profits there was in the business was to go to the homologation of what we owed Gilkeson-Sloss Commission Company."

Notwithstanding the foregoing statements of the two defendants, they also state—inferentially, at least—that this agency was a cloak to screen and protect them from other creditors, and that the four $1000 drafts were intended to swell the amount of their indebtedness, apparently, so as to serve as an additional security for them. But these statements are completely overcome by other testimony, and by their own conflicting evidence.

The contention of counsel for the seizing creditors (brief, p. 8) is to the effect that Bond & Williams were the equitable owners of the goods, and that the third opponents held the legal title as a *quasi* pledge, or in other words that third opponents were to *conduct the business* through the agency of the defendants until the latter's debts were paid and then transfer it to them.

Pursuing that theory, their argument is, that if, at any time, the defendants paid their indebtedness, they would, of right, be restored to the full ownership of the property, regardless of the will of their creditors, and inure to the benefit of all of their creditors generally. Hence they insist that, inasmuch as, under the code, the *perfect* ownership of a thing is vested in him who has *immediate dominion* of it, and not in him who has a *mere beneficial right* in it (R. C. C. 489 and 490), Gilkeson-Sloss Commission Company were never owners of the merchandise in dispute, because they only had a beneficial interest in it. But this argument fails, necessarily, because they were not merely *conducting the business* through defendants, as agents, but were the *actual owners* of the goods by means of the sheriff's adjudication.

The code provides also that in case the thing sold remains in pos-

session of the seller because he has reserved to himself the usufruct, or retains possession by a precarious title, there is reason to presume the sale is simulated, and, with respect to third persons, the parties must produce proof that they are acting in good faith and establish the reality of the sale. R. C. C. 2480.

But assuming that defendants are, in the sense of that article, holding possession by a precarious title and have the burden of proof put upon the third opponents to make out their good faith and show the reality of the sale, we are of opinion that, considering the proofs already adverted to, they have discharged that burden and shown their good faith, as well as the *reality* of the sale *ab initio*.

Assuming that the defendant's possession was precarious, that fact would justify the direct seizure of the plaintiffs in execution and nothing more.

But there are several transactions and circumstances that counsel for the seizing creditors cite and rely upon as completely offsetting the proofs of the *reality* of the transaction that are furnished by the plaintiffs in injunction.

Some of them are as follows, viz.:

First. That, notwithstanding the contract of mandate from third opponents to the defendants, whereby it is claimed that the relations of principal and agent were established, bears date February 4, 1892, yet their account with Bond & Williams, agents, was opened on January 6 previously, and upon which are entered as *debits* the following items, to-wit: (1) The draft given by Burwell to the sheriff for the stock of goods; (2) the amount of attorneys' fees paid by them in their proceedings against Bond & Williams; (3) sundry drafts of Bond & Williams, given for rent, to various persons, and for other purposes—thus evidencing the continuation of their old account against Bond & Williams individually.

As subsequently explained in the testimony of third opponents' witnesses, these were possibly erroneous entries on the account; but, under the agreement of the parties, that when "from the profits of the business (they) had realized their debt," they were "to restore the property and business to the defendants," it was altogether right and proper for the plaintiffs to have kept an exact and faithful account of all their expenses and expenditures in order that they might know *when* "from the profits of the business they

had realized their debt," and were under obligation to restore the property to the defendants.

Under their agreement it could not certainly be expected that third opponents should lose the money they had expended in the purchase of the property, the amount of the attorneys' fees and costs they had expended in the litigation in which they acquired the property, and then surrender the property upon defendants making payment of their judgment debt alone. Surely not. On the contrary, is it not reasonable that in making a composition with their judgment debtors, third opponents should have required, as a condition, the full and complete satisfaction of all dues and demands? We think so. It would have been a circumstance to which suspicion might have attached had such an arrangement been made and no provision incorporated therein looking to the reimbursement of such costs and expenses to Gilkeson-Sloss Commission Company.

Second. That in the course of the correspondence between the plaintiffs in injunction and the defendants, the former wrote a letter to the latter, in which the ownership of the merchandise in question was admitted to be in them. It is as follows, viz.:

"ST. LOUIS, October 14, 1892.

"*Messrs. Bond & Williams, Bonita, La.:*

"DEAR SIRS—Your letter 14th received, with B. L. 17 bales cotton; the cost of carrying, *including loss in weight*, this early in the season will soon amount to a sum in excess of any reasonable advances. As regards the cotton you have picked, it ought to be insured. You can't afford to lose 250 to 275 bales cotton. *Your merchandise, gin and store ought to be insured also.* It costs something, but pays; in fact, you can't afford to go without. The market continues to decline, although crop reports are favorable.

"Yours very truly,

"JOHN M. GILKESON, *President.*"

This isolated letter, that is much relied upon by the seizing creditors, is, to our thinking, explained by the statement of Gilkeson and Burwell; and their testimony is supported, in the main, by the other facts and circumstances of the case. The fact that, out of all the letters, contracts, accounts and bills of lading, this is the *only* one that can be found in which such an admission is made most clearly indicates that it was altogether unintentional. This idea is

strengthened when we take into consideration the strenuous effort that is made by counsel of the seizing creditors to impair and destroy the effect of the testimony of these witnesses. On this score their contention is, that they were guilty of perpetrating a fraud upon the District Court, and this court, on the trial of the case of Gilkeson-Sloss Commission Company vs. Bond & Williams, Yale & Bowling in liquidation, and A. Baldwin & Co. Limited, third opponents in this, to-wit: That, in that case, the plaintiff company were enabled to defeat the charges of fraud that were made therein by third opponents and intervenors, and obtain a final judgment sustaining their attachment against the property of the defendants, and amongst other properties the stock of merchandise in dispute, and mainly upon the testimony of those two witnesses. That, in the recent suit of Mrs. John A. Williams vs. Gilkeson-Sloss Commission Company—a case just decided by this court—the defendant company defended, on the ground that the draft in question for $5000 and more, which figures on their account against the defendants, had not been paid, or realized as claimed and averred on the trial of that suit; and that, consequently, they did not owe the plaintiff as payee the amount thereof. That their contention to that effect was embodied in their answer in this last named suit, and constitutes a judicial confession of an unconscionable fraud that the said witnesses enabled the plaintiff company in the first named suit to perpetrate upon a court of justice.

The statement relied upon is as follows, viz.:

"That said draft was drawn with the agreement and understanding by and between your defendant's agent, Burwell, and plaintiff and plaintiff's husband, John A. Williams, of Bond & Williams, that the same was to be drawn and endorsed by plaintiff and forwarded to your defendants in St. Louis; that the same was to be charged in account versus Bond & Williams, and that no part of said draft was to be paid by your defendants until they were paid in full by Bond & Williams all indebtedness of Bond & Williams to your defendants, and then whatever amount they could realize out of claim or judgment against said Bond & Williams, that said draft was to enter into and make up, from the property of said Bond & Williams, was to be paid to plaintiff." Record, p. 416.

The contention of counsel is, that this judicial confession is directly at variance with the testimony of the plaintiffs and that of their

agent, Burwell, in the former case, which was to the effect that their *entire* account against the defendants was just and due, and upon which testimony the court founded its judgment. And that, had the confession that was made in said answer been made known to the court in the former case, a judgment would have been rendered thereon dissolving the plaintiff's attachment.

Counsel's theory seems to be that the attachment must necessarily have fallen, because such proof as that which is contained in said answer shows that defendant's indebtedness was *contingent* and not absolute.

But without going into any refined discussion of this question, it seems quite sufficient to say that, conceding the prejudicial effect of the former testimony upon the credibility of Gilkeson and Burwell, we are unable to perceive any reason why the same consequences should not attach to the credibility of Bond & Williams, who were evidently cognizant of it and consenting to it. For, if it impairs the credibility of the former, it certainly does that of the latter; and disregarding the testimony of Gilkeson, Burwell, Bond and Williams would strip the case of the seizing creditors of any support.

Aside from their testimony there are sufficient facts and circumstances detailed in the record to sustain the adjudication and defeat the charge of simulation. And, without sanctioning the course pursued by Gilkeson and Burwell, we must say that, even if their testimony in the former case was disingenuous and untrue, yet, as it is supported by other indubitable proofs in this case, we can not pronounce same wholly unworthy of belief.

After a careful examination and study of this case in all of its bearings, our conclusion is that the charge of simulation is not made out, but that the adjudication of the stock of goods and merchandise to the plaintiffs in injunction was a *real* transaction, and that they are entitled to the affirmance of the judgment pronounced in their favor by the court *a qua*.

Judgment affirmed.

No. 1268.

ALBERT J. LESTER VS. ED. CORLEY.

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The proof disclosing that plaintiff's daughter had eloped with a young man, at night, on foot, and alone, and that they passed the latter half of the night at a stranger's house, together, the defendant was justified in stating to a party of

friends, who had been called together in consultation in regard to the matter, the nature and character of certain rumors that were in circulation in the neighborhood, in reference to her improper intimacy with the person with whom she had eloped, as a reason that induced him to believe that they should immediately get married in case of their capture by the parties in pursuit of them at the time.

Such a statement is utterly wanting in malice, the essential ingredient of defamation and slander.

APPEAL from the Sixth District Court, Parish of West Carroll. *Ellis, J.*

Robert Whetstone for Plaintiff and Appellant:

1. Every act whatever of man that causes damages to another obliges him by whose fault it happened to repair it. C. C. 2315.
2. In an action of slander the only possible defences are: either a denial or a justification, or a confession under mitigating circumstances. R. S. 3640; 14 An 406; 15 An. 166; 36 An. 469; 38 An. 162.
3. There is no such thing in law as a half-way justification. Townsend, Libel and Slander, Par. 212, and note.
4. Charging plaintiff with being a rogue is slanderous, and actionable, as tending to his infamy, discredit and disgrace. Starke on Slander, Vol. 1, Pars. 12, 13, 14, 15, 16, 17; C. C. 2316, 2315; 14 La. 389; Miller vs. Halstein, 12 An. 894; 23 An. 280; 36 An. 469; 38 An. 162; 6 An. 779.
5. The use of opprobious epithets implies malice, where they are slanderous *per se*, which reflect upon and bring into contempt and disrepute the honor of a female of good social standing, and suffices to maintain an action in damages without proving special damage. Starke on Slander, Vol. 1, Preliminary Discourse, Pars. 13, 14, 15, 16, 17; 11 An. 206; 33 An. 914; 38 An. 162; 43 An. 967.
6. Malice implied in the use of opprobrious charges do not mean a spite against the individual, but *malus animus*, a wanton disposition grossly negligent of the rights of others. 11 An. 206; 36 An. 469.
7. Malice is an imputation of the law from the false and slanderous nature of the charge. Legal malice need not be proved. 3 La. 207; 2 R. 365; 5 R. 116; 8 R. 51; 25 An. 170; 36 An. 467.
8. The maliciously calling a woman a damned whore is actionable. Starke, Vol. 1, Pars. 12 to 17; 6 An. 779; 16 La. 389. Where the law implies malice—*i. e.*, where the words are slanderous *per se*, damages are recoverable without proof of special injury. 14 La. 198; 16 La. 389; 12 An. 894; 23 An. 280; 25 An. 175; 27 An. 219; 29 An. 172; 36 An. 469; 38 An. 162; Sedgwick, Measure of Damages, Par. 39; 34 An. 914; C. C. 1934.
9. Malice is implied from the circumstances of the case; from the conduct of defendant; from the nature and falsity of the charges; from the injury necessarily consequent thereon. Both malice and injury may be inferred from the nature and falsity of wrongful act without lawful justification or excuse and from want of probable cause. Starke, Pars. 212, 213, 215, and cases cited; 40 An. 423; 27 An. 214; 11 An. 206; 16 La. 389; 3 An. 69.
10. Intemperance, or drunkenness, is not a defence to an action of slander. Townsend, Libel and Slander, 249; Ogden on Libel and Slander, 169; 5 Ill. 30; 25 Iowa, 87; 38 An. 163.

11. Where a party circulates defamatory charges on mere rumor, he can not screen himself by proof of such rumors. 15 An. 492.
12. Every person has a right to enjoy that degree of respect, good will and social and business distinction to which his own acts and his social and business habits entitle him, and any one who unlawfully interferes with his right, by circulating scandalous reports, renders himself liable for consequent damage. Starke on Slander, 99, No 2.
13. Injuries to the feelings and to one's social standing are not susceptible of precise adjustment, but such injuries are recognized as a legitimate ground of action for reasonable indemnity. 17 An. 64; 19 An. 322; 23 An. 280; 38 An. 162; 43 An. 967.
14. This court has granted the following sums as reasonable compensation, in the following cases of slander and libel, viz.: In Green vs. Harvey (14 La. 204) the compensation allowed plaintiff for slanderous charges of forgery was $450; that award to the plaintiff (in 16 La. 198) for the charge of being a rascal and of false swearing was $500; that allowed the plaintiff in Cook vs. Tardos (6 An. 679) for being called a thief was $400; the amount awarded to the plaintiff in Williams vs. McManus (38 An. 161) for being called a damned whore was $500; the amount allowed the plaintiff in Sportorno vs. Fourchian (40 An. 423) for the circulation of the slanderous report that he was a negro was $500; the amount awarded plaintiff in Morhenan vs. Ohse (17 An. 64) for having been denounced as a damned thief was $1000; the amount allowed plaintiff in Baunm vs. Elliott (19 An. 322) for slanderous and defamatory words was $1000; the amount allowed plaintiff in Savoie vs. Scanlan (43 An. 967) for being called a rogue was $300.
15. Under the law and jurisprudence of this court appertaining to libel, and slander, these are mixed questions of law and fact, of which courts are better judges than jurors are. 43 An. 967

Gray & McBain and *Wells & Wells* for Defendant and Appellee:

1. Malice in cases like the present is an essential ingredient; for if it appear that the words, though slanderous, were spoken wholly without malice (and of this the jury are to judge) the defendant will be entitled to a verdict. Starke on Ev., Part 4, p. 867, also 2 R. 365.
2. Where the declarations of the defendant concerning the plaintiff appear to have been uttered without malice, and under circumstances from which no malice is in law implied, they carry with them no pecuniary responsibility. 8 An. 130.
3. In an action in damages for slander the burden falls on the plaintiff of showing that the language complained of *was used* by the defendant, *and with malicious* intent. 21 An. 308.
4. If the circumstances of the speaking were such as to *repel* the inference that the words were uttered with malicious intent, and exclude any liability of the defendant unless upon proof of actual malice, the plaintiff must furnish such proof. Greenleaf on Ev., Vol. 2, p. 337.
5. If the charges are *false*, *injurious* and made *maliciously* (or *malo animo*) they combine all the elements essential to support the action. 40 An. 424.

The opinion of the court was delivered by

WATKINS, J. This is an action in damages for defamation and slander of the plaintiff's daughter, and the plaintiff is appellant from

an adverse judgment, predicated upon the verdict of a jury rejecting his demand.

The charge of the petition is that defendant did wilfully, maliciously and libelously slander and defame the character of his fourteen-year-old daughter by asserting in a public place, and in the presence and hearing of a number of persons, that she had been seduced by one John Bowling, who had kept her as his mistress, and was thus keeping her at the time.

That said false and slanderous statements had exposed his daughter to hatred, contempt and ridicule, and caused her to be shunned by her acquaintances, and that her only means of redress is in a court of justice.

As an aggravation of the slander and defamation charged, the plaintiff further avers that said false and slanderous assertions of the defendant has not only injured her, "but has injured him personally and every member of his family;" and "that same has exposed him and every member of his family to hatred, contempt, ridicule and obloquy, and has caused them to be shunned, and has injured them in the community in which they live."

Upon the foregoing averments plaintiff declares that his daughter personally, he himself and his family have been damaged in the sum of $10,000, and he prays judgment for that sum in his *own* favor—other members of his family not being joined in the suit as parties plaintiff or defendant.

First pleading an exception of no cause of action, defendant subsequently excepted that the petition was vague and too indefinite to admit of explicit answer; and that it was further defective, in that it alleges that $10,000 damages was done to himself, his daughter and the members of his family generally, without apportioning the share or portion of each, in consequence of which he demands that the suit be dismissed.

These exceptions having been overruled, the defendant filed an answer, the purport of which is that at the time of said alleged slanderous utterances being made plaintiff's daughter Susie had just eloped with John Bowling, without the authority or consent of her parents, and was at the time absent; and that the relatives and friends of the plaintiff were then engaged in making search for the couple. That, being at the residence of a neighbor, several other neighbors being present, the question was being discussed between

them and the defendant as to what was the best thing to be done with the runaway couple in case they were apprehended; and the latter admits that he did say that "they should marry, because, *from all the information he could get* they had been as good as married for nearly two years."

But defendant avers that this remark was made without malice on his part, it being only a suggestion as to the best thing that could be done under the circumstances. That it was but the repetition of a common rumor in the neighborhood at the time, and that said report was true, but he affirms that he never repeated or circulated this rumor, and denies that it had any injurious effect on the plaintiff or any member of his family—his daughter having married another man during the pendency of this suit, with her father's permission and at his residence.

In the course of his argument defendant's counsel invited attention to his exceptions, and insisted that they were good and should have been sustained by the district judge.

It seems clear that his exception of no cause of action was not well taken, if it was not formally abandoned, but we think it was abandoned, at least, in effect. And his dilatory exception is untenable—the averment complained of having been manifestly intended to show an aggravation of the defamation and slander as a means of enlarging the *quantum* of damages.

On the merits the proof is brief but pertinent, and, in the main, harmonious.

In respect to the *truth* of the report affecting the chastity of the plaintiff's daughter there is some doubt, she denying and he affirming its correctness, but as to the *existence* of such a rumor in the vicinity in which plaintiff lived there is, in our minds, no doubt. And it is equally clear that defendant had *heard* the rumor for some time previous to the time of the occurrence of the alleged slander, though disbelieving it until the elopement took place and brought the circumstances to his mind again.

The testimony of the defendant is in keeping with the averments of his answer and the testimony of several of plaintiff's witnesses.

All the evidence shows him to be a man of character and first respectability in the neighborhood in which he lives. The fact of plaintiff's daughter having eloped with the young man in question, under very peculiar and significant circumstances, superinducing

pursuit by father and friends, was the immediate cause of his neighbors collecting together for purpose of consultation.

The very object in view was assistance and comfort to the plaintiff in his hour of tribulation and distress—not annoyance and vexation. At this consultation the defendant took the position that in case the erring couple were apprehended and brought back to the paternal roof they should marry, announcing his opinion on the faith of what he had heard currently reported in the neighborhood. There is no question of the fact that his advice was correct, for the proof shows that the girl was married soon after this suit was filed, albeit to a different man.

One of the plaintiff's principal witnesses, in speaking of what transpired at the consultation, says:

"I remarked, after Mr. William Corley had made some remarks, that I would kill the girl before she should marry Bowling, and then Mr. Ed. Corley made the remarks which I have related," thus characterizing the circumstances that lead up to the defendant's statement, and evidencing the absence of malice or ill will toward the plaintiff.

The circumstances of the elopement of the plaintiff's daughter with Bowling are thus detailed by themselves as witnesses.

Bowling's statement is as follows, to-wit:

"I lived last year, 1891—the first part of the year, up to about July—at Mr. Lester's. I worked in the field. Members of his family worked in the field with me. I know Susie Lester. She worked in the field with me a little. Susie and I left there some time in June. We started about 8 o'clock at night. We left on foot. We came down the big road toward Floyd. Went down to about one mile this side of Goshen. We traveled all night. We were brought back by Lee Virgil and James Lester."

The statement of Susie Lester, daughter of the plaintiff, and now the wife of Lewis, is as follows, to-wit:

"It is a fact that I left my father's house and went with John Bowling. It was about 8 o'clock at night when we left. We went on foot. We went down nearly to the parish line on the road to Delhi. We did not walk all night. * * We rested from 12 o'clock until daylight. We stopped at Mrs. Sweet's. We left there just at sunrise."

The foregoing are very suggestive circumstances, indeed. Re-

capitulation or comment would not strengthen them, or render them any more cogent or convincing.

We do not feel willing to announce it as our opinion that the charges preferred against the plaintiff's daughter were proved beyond the peradventure of a doubt, but it is our deliberate conviction that the defendant had sufficient ground to make the statement he did under the circumstances detailed. That he did not maliciously and causelessly utter and publish a libelous slander to the world, with the purpose or expectation of inflicting injury upon the plaintiff or any member of his family. Having heard of rumors to the prejudice of the young girl, her sudden flight with young Bowling on foot at night, and alone, was quite sufficient to confirm his previous suspicions; and when the plaintiff's friends and neighbors were summoned together—he among them—for the purpose of consultation, what more reasonable or natural than that he should give the facts within his knowledge and information, and state his conclusions; particularly, as the girl's own course of conduct had not only invited, but rendered same necessary.

We are clearly satisfied that the finding of the jury was correct, and is in consonance with equity and justice.

The case of Scanland vs. Savoie, 43 An., is not a parallel case.

Judgment affirmed.

No. 1280.

A. BALDWIN & CO., LIMITED, vs. BOND & WILLIAMS.

OPPOSITION OF GILKESON-SLOSS COMMISSION COMPANY.

Same as in case cited in opinion.

APPEAL from the Fifth District Court, Parish of Morehouse. *Richardson, J.*

Boatner & Lamkin for Plaintiffs and Appellants.

Ellis & Hall and *Newton & Cason* for Third Opponents and Appellees.

The opinion of the court was delivered by

WATKINS, J. This case being founded upon the same state of facts as that presented in the case of Yale & Bowling, in Liquida-

tion, vs. Bond & Williams, Opposition of Gilkeson-Sloss Commission Company, No. 1279, on the docket of this court, and just decided in favor of the plaintiffs in injunction, for the same reasons as are therein assigned like judgment should be pronounced in this case.

Judgment affirmed.

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No. 1266.

MRS. M. K. WILLIAMS AND HUSBAND VS. GILKESON-SLOSS COMMISSION COMPANY.

The condition on which the property attached is released and delivered to the defendant is that he should appear by attorney or in person, and that he should furnish security *judicatum solvi*.

The absent defendant by appearing and bonding the property attached, waives citation.

The defendants in another suit judicially admitted their indebtedness to the plaintiff and obtained judgment for the amount against plaintiff's former debtor.

They are not to be heard who allege things contrary to each other.

APPEAL from the Fifth District Court, Parish of Morehouse. *Richardson, J.*

Potts & Hudson and *F. T. Baird* for Plaintiffs and Appellees.

Newton & Cason and *Ellis & Hall* for Defendants and Appellants.

The opinion of the court was delivered by

BREAUX, J. Plaintiff is the wife of John A. Williams, a member of the firm of Bond & Williams. In 1891 this firm became indebted to her in the sum of $5912.

The defendants were the commission merchants of the commercial firm of Bond & Williams, to whom they advanced supplies and furnished money during that year in a large amount.

In November, 1891, they executed a draft on the defendant to pay their indebtedness to plaintiff.

The plaintiff, the payee, endorsed the draft and forwarded it to the defendant, with direction to place the amount to her credit.

In December of that year, the firm of Bond & Williams being financially embarrassed, and not having complied with its obligation

to the defendants, the latter sued them and obtained a writ of attachment.

They alleged in their petition in that suit that, after allowing al proper credits, there was a balance due them of $16,292, as per itemized account.

Their account was filed in evidence on the trial; it shows that on December 1, 1891, the plaintiff was credited for the amount of her draft, and that the firm of Bond & Williams was charged with the amount so credited.

Judgment was pronounced for the said balance upon due proof of the amount of the indebtedness.

It includes the sum of $5912, amount of plaintiff's draft.

Property attached, movable and immovable, was seized and sold. It was bought by the defendants.

The amount of the sale did not satisfy the judgment; there is a large balance due to the defendants, who are absentees.

The plaintiff sues to recover the amount of the draft forwarded to the defendants as stated, and prayed for writ of attachment and for garnishment process, which were issued, and certain claims of the defendant were taken possession of under the writ.

In reference to this draft the plaintiff testified in the case at bar in support of defendant's account (which account had been previously proved up in case 6852), filed in their suit against Bond & Williams, and denied that any agreement was entered into differing from the allegations and the judgment obtained against her late debtors, the firm just named. One of the defendants states, as a witness, that there was an agreement that the money was not to be paid until all the indebtedness of Bond & Williams had been paid.

That the amount of the draft sued on in this case is charged to Bond & Williams.

The testimony of a witness (defendant's agent) who testified in the suit of defendant's agents, Bond & Williams, No. 6852, that he knew nothing further than is stated on the face of the draft, and of another witness, was admitted over defendant's objections.

On the trial of the case at bar the testimony of these two witnesses and the letter marked A were offered to prove the agreement alleged in defendant's answer, was excluded for the reason set forth in the plea of estoppel.

There was no copy of the citation and of the petition and writ of attachment, posted at the court-house door.

Personal service was made on the curator *ad hoc* appointed to represent the absent defendant.

The curator *ad hoc* appointed by the court was also the attorney of the defendants.

He, as curator *ad hoc*, applied to the court for an order authorizing the defendants to take possession of the property attached on their furnishing bond.

He, as attorney for the defendants, not as curator *ad hoc*, had previously agreed with the attorney for plaintiff to the delivery of the property attached to the defendants on their furnishing solvent bond.

The bond was furnished by the defendants, represented by their authorized attorneys.

The property was delivered to them.

Judgment was pronounced in favor of the plaintiff for the amount claimed, and the property attached was ordered to be sold in satisfaction of the claim.

The defendants appeal.

The plaintiff answers and prays for damages for a frivolous appeal. The bill of exceptions reserved by the defendants to the court's ruling, excluding the testimony of two witnesses, and the letter marked A, will be considered with the merits of the case.

The defendants defend on two grounds:

1. That the service is illegal; the required posting of the petition, citation and writ of attachment at the court-house door not having been complied with.

2. That the defendants became the owner of plaintiff's claim, and were subrogated to her rights under a verbal stipulation that no payment would be exacted of them before the collection of the amount of plaintiff's draft from the drawers—the firm of Bond & Williams.

In reference to the first proposition the plaintiff's counsel argue that the defendants waived the informality of service of citation and writ of attachment by their appearance in the suit and furnishing bond, and obtaining the possession of the property attached.

In reference to the second proposition they plead an estoppel, for the reason that the defendants in their suit against Bond & Williams, A. Baldwin & Co., and others, intervenors, recovered judgment for the amount and placed themselves in such attitude as to preclude the possibility of sustaining the defence, that the plaintiff is not a creditor as alleged.

This brings us to the first point, that embraced in the motion to dissolve the writ of attachment.

The defendants in their agreement to bond the property attached, and in their petition for the order authorizing them to furnish bond and take possession of the property, did not reserve any right to plead informality of service.

They appeared in the suit and unqualifiedly delivered to the sheriff their obligation to satisfy such "judgment to the value of the property attached as may be rendered against him in the suit pending."

It is the appearance authorized by Art. 259 of the C. P.

It is characterized as an appearance in the suit.

The only question for our decision is, does that appearance cure the informality of service alleged?

It is determined in a number of decisions that the appearance of a defendant in a suit cures want of citation.

Our attention is directed by defendant's counsel to the case of Love vs. Dickson, 7 M. N. S. 167, that defendant's giving bond and taking the property out of the possession of the sheriff does not cure a defect similar to that pleaded in the case at bar, and that "it is a well settled rule that nothing cures defects in citation but appearance and pleading to the merits."

Subsequent to that decision the point arose in other cases and appearance to release property attached was held as an appearance having the effect of curing informality in citation.

In Rathbone vs. Ship London, 6 An. 440, the bonding of property attached was given an effect at least equal to an appearance curing a defective citation or the absolute want of citation.

The court says: "The condition on which the property attached is released and delivered to the defendant is that he should appear in person or by attorney, thus rendering himself liable to a judgment in his default to answer, and that he should give security *judicatum solvi*. We do not understand that the constitutionality of this article

is drawn in question, or the power of the Legislature to enact it. It seems to us, beyond all question, that the purpose of the law was to give, in the case provided, to the creditor a personal judgment against the debtor, which he was required to give security to abide by and perform." The words of the article are free from any qualification or ambiguity and leave room for no other interpretation.

In Love vs. Voorhies, 13 An. 550, this court decided that the act of bonding the property attached does not debar the party giving it from subsequently moving to quash the order of attachment.

The question of citation did not arise in that case. The decision gives no support to the proposition that appearance to bond property attached does not cure the want of citation.

The court in that case approvingly refers to the case of Rathbone vs. Ship London. Beirhand Thompson vs. Deming, 24 An. 274.

The bond was not executed in the name of the curator *ad hoc*.

The property was delivered to the defendant and the waiver therefore was the act of the defendant.

The alleged conditional acceptance of the draft presents the remaining issues.

It is not denied that plaintiff was the creditor of Bond & Williams. Her right to receive the draft does not admit of question.

The disposition made of it is not an infrequent act in business—*i. e.*, to send a draft to the drawee, the merchant, with direction to place the amount for which it is drawn to the payee's credit.

It is possible, ordinarily, to receive a special and conditional acceptance of a draft in lieu of an absolute acceptance.

A verbal acceptance may be shown.

These undeniable propositions are without force or application in the case at bar, for the reason that the defendants have declared in another suit that the draft was paid and the amount placed to plaintiff's credit.

He is not to be heard who alleges things contrary to each other. Edson vs. Union Bank, 11 An. 710.

The drawer was the common debtor of the plaintiff and the defendants.

They chose to receive the draft and place the amount to her credit without any entry whatever of any condition as to deferring payment in any contingency.

They are the owners of the claim with a title recognized by the courts and decreed legal in every respect.

The defendants, as plaintiff in that case, alleged their ownership and proved that the amount was credited to Mrs. M. K. Williams, plaintiff in this case.

They can not now be heard to prove that the entry was not correct.

That the cash carried to plaintiff's credit, as proven in the case referred to, was not cash.

They can not discredit their own title and prove the incorrectness of their own judgment.

Bond and Williams were condemned to pay the amount in question to the defendants as their creditors.

The terms of the judgment can not be changed; it can not be held that the amount was not due to the defendants, but to another.

The regularity required in judicial proceedings and the absolute correctness which should characterize every judgment will not sanction the shifting of positions at will, by those on whose allegations and proof they were obtained.

The judgment of the defendants must remain unchanged as to the amount in question.

If the conditions alleged were to prevail at this time, a final judgment would be without *raison d'être*, as to nearly one-third of its amount.

The defendants can not ignore their own judgment, their judicial declarations and their evidence.

The court will not allow the substitution of one debtor for another by creditors at whose instance the judgment fixing their rights was pronounced.

Our conclusion in reference to the effect of allegations and proof in a former suit, No. 6852, sustains the correctness of the court's ruling in excluding testimony offered to establish that others and not the defendants are the debtors.

The testimony of witnesses who testified in the former case was not *inter alia* as to defendants and appertains to the issue involved. The ruling admitting this testimony was not erroneous.

The appellant has not sustained her demand for damages. The issues presented do not impress us as being frivolous.

Judgment affirmed at appellant's costs.

No. 1270.

MRS. M. L. BENNETT VS. HER CREDITORS.

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When a party applies for and obtains two orders of appeal in open court, one to the Circuit Court of Appeals and the other to the Supreme Court, and prosecutes one, which is dismissed for want of jurisdiction, this order being null and void, he can avail himself of the other order for an appeal, and prosecute it in the court having jurisdiction.

The granting of a respite to the debtor by creditors does not impair the privilege they may have on the debtor's property. The property burdened with the privilege can not be sold and the proceeds ratably distributed among the creditors—only the surplus, after satisfying the privileged debt, can be so distributed.

APPEAL from the Fourth District Court, Parish of Caldwell. *Wear, J.*

Boatner & Lamkin for Plaintiff and Appellee.

Gunby & Sholars for Opponents and Appellants.

ON MOTION TO DISMISS APPEAL.

The opinion of the court was delivered by

McENERY, J. The appellants obtained two orders of appeal in open court from the judgment—one to the Circuit Court of Appeals and the other to this court.

They were applied for and obtained at the same time. The appeal to the Circuit Court of Appeals was prosecuted and dismissed for want of jurisdiction, after which this appeal was prosecuted.

The first appeal prosecuted was a nullity, and the second valid and legal. It was in force and could be prosecuted in accordance with the order granting it. Because the other order obtained at the same time for an appeal was null and void it could not affect the order of appeal made returnable to this court.

The motion to dismiss the appeal is therefore denied.

ON THE MERITS.

The plaintiff applied for a respite and obtained an order for a meeting of creditors. The meeting was held and the respite was granted by the creditors.

The homologation of the proceedings of the meeting of the creditors was opposed by the Southern Grocer Company, Williams Tobacco Company, Wellhouse & Sons and Hancock Bros. & Co., creditors of plaintiff, who appeared at the meeting and voted against the respite being granted. In number, twelve creditors voted for the respite and seven against it. In amount, the sum of $13,028.21 was voted for and the sum of $627.39 against it.

The opponents allege in their oppositions: 1. That the plaintiff is now, and was at the time of filing her petition for respite, hopelessly insolvent. 2. That the application for relief is not made in good faith, but for purposes of delay. 3. The schedule of liabilities does not correctly show the condition of plaintiff's affairs, as it omits the legal mortgage in favor of the minor, James Bennett, and embraces as creditors those who have no valid claim against plaintiff, particularly L. D. McLain. In case the respite should be granted opponents pray that plaintiff be required to furnish security, as required by law.

The proceeding of the meeting of creditors was homologated, the prayer of opponents denied, except as to the requirement for security. The regularity of the proceedings is not questioned; no error or fraud is alleged. We think the testimony shows that the plaintiff is solvent, but embarrassed.

L. D. McLain swears that the value of the assets is a fair one.

M. Mecum, clerk of the court, says that in 1887, 1888, 1889, 1890, he was in the employment of Mrs. Bennett. He is, so he swears, familiar with the parties whose names appear on the schedule, and he estimates that 50 per cent. of the notes and accounts are collectible.

C. C. Bridges, in his testimony, says 50 per cent. would be a fair collection of the notes and accounts.

C. P. Thornhill, an attorney at law, says that a great many of the debtors whose names appear upon the schedule are negroes, and but few of them own real estate. His opinion is that, on an average, not over 25 per cent. of the notes and accounts could be collected. Quite a number of the negro debtors, he says, have resided on plaintiff's place at different times and the majority of them own some personal property. During the past eighteen months he had seen and known very little of them. These are the only witnesses as to the value of the notes and accounts. We think the preponderance

of testimony is to the effect that 50 per cent. of them can be collected. The value of the real estate is not questioned. Deducting 50 per cent. from the notes and accounts, the assets will exceed the liabilities. We need not review the second ground, as the object of obtaining the respite is for delay to meet the obligations of the debtor.

On the second ground alleged by opponents, the testimony shows that L. D. McLain is a creditor of plaintiff for the amount for which he was placed on the schedule.

James Bennett is the son of plaintiff, a child fourteen years of age. This minor's mortgage omitted from the schedule is the recorded abstract of the amount of the inventory of the effects of his father's succession. There is no evidence that the plaintiff owes the minor any sum of money. At all events his liability on said mortgage is contingent, and it may be that in a settlement of the community she may not owe him anything.

Complaint is also made that the schedule is not true and exact, and is not sufficiently definite. It is itemized; the notes and accounts are accurately described, and so is the immovable property. But the opponents claim that "mules, horses, cattle and farming implements attached to the plantation, $3106," is too indefinite a description of this property. It is sufficiently identified with the plantation to which it is attached. The inventory, taken altogether, is a fair exhibit of plaintiff's property and is a substantial compliance with the law.

The complaint that the application for the respite was not made in good faith, we think is not sustained by the evidence. It appears that the plaintiff referred her affairs to her brother and to her attorneys. To avoid the necessity of a respite, they advised a compromise with the creditors—the brother, L. D. McLain, offering to advance the money in case all the creditors accepted the proposition. Some accepted and some declined the proposition, and the proposed settlement was of necessity abandoned. We find nothing in these several offers to adjust her indebtedness that impugns her good faith in her application for the respite.

Judgment affirmed.

ON APPLICATION FOR REHEARING.

On the application for a rehearing in this case our attention is called to the fact that we have not considered as applicable to the case the authority referred to by opponents in case of Phillips vs. Creditors, 36 An. 904, and have omitted to notice in the opinion the "main ground" upon which was based the appeal.

1. The case of Phillips vs. Creditors has no bearing on the facts in this case. The only statement of assets in that case was "Merchandise, as per ledger and open accounts, horses, etc., $10,320." In the case referred to we said such a schedule was equivalent to no schedule at all. The schedule in this case presents no such defects. The horses, mules, etc., are identified with the plantation to which they are attached and are valued.

2. In opponent's brief it is stated in reference to the "main ground" on which the application for a rehearing was the basis of the appeal, "Your honors will understand that while opponents did not base their opposition on this specific ground, yet testimony quoted below was received without objection, and will of course be considered by the court." In the application for a rehearing it is also stated, "it is true that the above testimony is not directly responsive to any allegation in our opposition, but it was received without objection, and of course will be considered by the court." Not having been specifically alleged in the opposition, and the evidence not being responsive to any allegation made by opponents, we were of the opinion that this part of the opposition, urged only in the brief and in argument, was not seriously insisted upon by opponents from the following extract from their brief: "To take advange of this act [the failure of the deputy sheriff on the persuasion of plaintiff to seize ten bales of cotton on the plantation, which was afterward turned over to L. D. McLain, who had a privilege on it] of indulgence of the sheriff and remove the cotton to avoid its seizure was an act of extreme bad faith in plaintiff; but opponents have not held her individually responsible for the ungracious act." The omission was not from inadvertence, as we had fully examined the record and the brief of opponents, and inferred from the facts and the brief that this point was not seriously pressed, but that the plaintiff was relieved from responsibility individually and the blame attached to her brother, and this explanatory para-

graph was introduced in order to excuse her and criticise him. Opponents say in their brief: "The plaintiff had for quite a number of years been conducting business as a public merchant and there had been nothing in her career to indicate that she was familiar with any of the various shifts and devices often resorted to by insolvent debtors to place their property beyond the reach of creditors, or to give an unfair preference to some of them. It was left for her 'financial manager' to invoke and to put in operation through the machinery of the courts an equitable remedy intended for the relief of the embarrassed but honest and solvent debtor," etc.

Referring to the facts in the record, it appears that L. D. McLean had furnished the money and supplies that raised this cotton. This is not contradicted. He had a pledge and privilege upon it. The opponents do not assert any privilege upon it. They are ordinary creditors.

The proceeds of the sale of this cotton could not be ratably, as contended by opponents, applied to the payment of all the debts. By granting the respite the creditors do not relinquish the privilege and pledge they may have on particular property. Mrs. Bennett, at any time after the respite was granted could—in fact, she was bound, under her agreement to do so—turn the cotton or its proceeds over to the furnisher of supplies. He had a right to the proceeds of the sale sufficient to pay his privileged debt. The surplus only could be ratably applied to the payment of the other creditors.

Opponents were in no way injured by this disposition of the cotton. The evidence does not satisfy us that there was a surplus after paying the privileged debt. No complaint is made of the amount for which the cotton was sold.

McLain's debt for supplies furnished on the crops raised and gathered amounted to $3000, and for the current year $2250, which was placed on the schedule.

We do not see in what manner opponents have been injured, and we are satisfied that the plaintiff has made a fair exhibit of her assets and liabilities, and has been guilty of no fraud in applying for relief.

Rehearing refused.

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No. 1277.

REYNOLDS & HENRY CONSTRUCTION COMPANY VS. THE MAYOR AND CITY COUNCIL OF MONROE.

In its application to municipal corporations particularly, the estoppel pleaded must be unequivocal and certain.

The terms of the contract between plaintiffs and defendant's assignor, and the statutes, made the official promulgation of the returns of the special election a condition precedent to any ordinance by the council levying the special tax.

Prior to the promulgation giving sanction to the election as held, the tax-payers can not be compelled to pay the special tax.

APPEAL from the Fifth District Court for the parish of Ouachita. *Richardson, J.*

Boatner & Lamkin for Plaintiffs and Appellees:

Exemption from taxation of persons or property is not in contravention of Arts. 203, 205 and 207 of the Constitution, so long as no injury flows therefrom. 44 An. 863.

The provisions of said Arts. 203, 205 and 207 apply to general taxation only, and not to *special assessments* or *taxes voted* for *local improvements*. 3 Wash. 84; 27 Pac. 1077.

The Mayor and City Council being ministerial officers only, whose duty it was to receive the returns of the election as made by the returning officer, and to declare the result of said election as shown by the face of the returns, without the right to reject, or in any manner alter the same, the failure to formally declare the result of said election *can not invalidate it*. 69 Ala. 281; 41 Ark. 111.

The defendant can not allege the forfeiture and nullity of a tax and at the same time deny that it was voted.

The defendant having officially and publicly admitted the voting of the tax by declaring the same *forfeited*, and seeking to repeal the ordinance under which it was voted, is estopped from denying that the election was carried in favor of said tax.

A municipality is bound by its admissions and judicial pleadings, the same as private persons, and is entitled to no greater right or immunity as a litigant than they are, and the doctrine of estoppel applies to a municipality just as it does to individuals. 28 An. 462; 34 An. 359; 1 Dill., Sec. 521.

Solemn admissions of fact made in open court by a party litigant is conclusive and binding upon the party making such. 70 Ga. 384; 30 An. 838. In the absence of special statutory authorization, courts are without jurisdiction *ratione materiæ* to entertain cases of contested election. No statute invests the courts of this State with jurisdiction over contested elections to determine whether or not a special tax has been voted as authorized by the Constitution and Act 35 of 1886. 13 An. 89; 41 An. 846; 43 An. 1009; 44 An. 863.

T. O. Benton and *Chas. T. Madison* for Defendants and Appellants.

The opinion of the court was delivered by

BREAUX, J. The plaintiffs, assignees of the Houston Central, Arkansas & Northern Railway Company, sue the defendants to compel them to assess and cause to be collected and paid over to them a tax of 5 mills on all taxable property in the city of Monroe for one year.

On the first day of March, 1888, the City Council adopted an ordinance, upon the petition of a required number of tax-payers, calling an election under the laws of the State, and submitting the proposition to the property tax-paying electors of the city, of voting a five-mill tax for ten years in aid of the Houston Central, Arkansas & Northern Railroad.

The ordinance directed the returning officer to provide ballot boxes and appoint commissioners of election to write down the names of voters and make returns of election.

The returning officer for the parish of Ouachita, in 1888, testifies that commissioners were appointed and the election held on the tenth day of April, 1888.

That all the prerequisites to the election were complied with.

That he certified the result in writing to the Mayor and City Council.

The Mayor corroborates the statement as to the returns in testifying that the returning officer appeared at the meeting of the City Council and handed in the returns of the election.

The plaintiffs obtained an order of the court, directed to the Mayor and to the secretary and treasurer, to produce and deliver in court the returns to the council by the commissioners of election, and the returns of the returning officer, whereby he expected to prove that the result of the election was largely in favor of the tax.

These officers state in answer to the order that they have made diligent search for the documents referred to in the order and have not found them.

The secretary and treasurer avers that he entered upon the discharge of the functions of his office on or about the 14th May, 1888.

That there were held four meetings of the City Council from and between April 10, 1888, and the 14th day of May of that year, when he became an officer of the Council.

That there is no record or mention in the minutes of the receipt or filing of any of the documents referred to in the order.

It is admitted that the ordinance book does not contain any ordi-

nance promulgating the result of the election or mentioning the returns of the election.

The plaintiffs incorporate the ordinance under which the election was held in their petition, and they aver that "the result of the said election being in favor of voting said tax was duly promulgated by the Mayor and City Council of Monroe, La., as prescribed by law."

Further, that the assignors to plaintiffs began and prosecuted in good faith the building of the railroad in the parish of Ouachita and in the city of Monroe within ninety days after the promulgation of the vote.

We eliminate the other issues of the case and direct our attention in reaching a conclusion to questions relating to and growing out of the fact, that, there has not been as yet any promulgation of the return of election.

ESTOPPEL.

Before the trial the plaintiff interposed a plea of estoppel.

The City Council adopted an ordinance in which they declared that the ordinance 641, approved March, 1888, ordering an election for and authorizing the assessment of a five-mill tax for ten years on the property in the city of Monroe for plaintiffs' assignor is repealed and all rights thereunder forfeited for the reason that they had failed to comply with the conditions upon which the tax was authorized.

The plaintiffs contend that the defendants are estopped from denying that an election was held and a tax voted.

That in undertaking to repeal the ordinance they have admitted its legality and binding effect.

That by declaring the forfeiture of the tax and seeking to repeal the ordinance under which it was voted, they are estopped.

The District Court everruled the plea of estoppel.

The judgment on the merits was pronounced in favor of plaintiffs for one year's tax.

From the judgment the defendants appeal.

Our views coincide with the action of the District Court in overruling the plea of estoppel.

The truth of the proposition that the attempt at repeal did not affect any of the rights the plaintiff may have had is self-evident.

The counsel based their release from the burden of this tax upon other grounds than the alleged informality of the election.

They declared that the railroad company had not complied with its contract, and that as a result they were released.

This declaration did not have the effect plaintiffs' counsel intended it to have.

A municipal corporation seeking release from taxation on the ground that the tax is not due—that the consideration of the contract has failed, is not estopped from defending upon other grounds than want of consideration. Error in repealing or attempting to repeal an ordinance can not be made the basis of taxation.

Conceding, *argumenti gratia*, that the plea of estoppel was well taken, and that it should be sustained as to the municipality, it would not bind the tax-payer.

It is beyond the power of a municipality to thus bind them.

Touching the authority of municipal corporations, Mr. Dillon says: "The general principle of law is settled beyond controversy, that the agents, officers, or even City Council of a municipal corporation can not bind the corporation by any contract which is beyond the scope of its powers. The opposite doctrine would be fraught with much danger and accompanied with such abuse that it would soon end in the ruin of municipalities or be legislatively overthrown."

The power of taxation is a part of sovereign authority.

Declarations in the attempt to repeal ordinances can not have the effect of supplying complete omissions to record proceedings, although they may be supplied by other testimony.

Dillon on Municipal Corporations, Vol. 1, p. 370, *et seq.*

In reference to silence when it is the duty of the party to speak, and of its being equivalent to concealment, and operating an estoppel as argued by plaintiff's counsel.

We deem it answer to state that—

The party who contracts with a municipal corporation is without right to invoke the silence of its council and its failure to give proper notification of a want of formality as a reason to compel the tax-payer to pay tax, although not legally declared and announced.

He can compel compliance.

Save the first ordinance ordering the election, no record was kept.

It does not appear of record that anything more was done than to order the returning officer to deliver the returns to the secretary.

There was no compilation made of the returns.

In reference to them the returning officer says that they, to the best of his knowledge, were delivered to the secretary, and adds: "I announced the result of the election verbally is what I mean by promulgating the election." He does not state whether the election was carried for or against the tax.

The only remaining testimony upon the result of the election is the following by counsel during the trial:

"It is admitted that there have been three different councils elected since the tax in controversy was voted."

The admission was directed to the different councils elected.

It can not be determined that the remainder of the sentence sufficiently announces the result to fix the responsibility of the tax-payer.

OFFICIAL PROMULGATION.

Our examination of the record has not resulted in our discovering any testimony establishing that the election was carried for the special tax.

The statutes command that the municipal authority shall make public and official promulgation of the result. Art. 84 of 1880; Art. 44 of 1886.

Sec. 9 of the ordinance of special election provides for an official promulgation of the returns.

This ordinance must be read in the contract between the parties. It imperatively includes promulgation. The law and the contract have made it a condition precedent to the final action of the council imposing the tax. Mandamus will lie to compel compliance with the statutes and the terms of the contract, but the tax-payer can not be made to pay the taxes prior to official promulgation of the result of the special election.

Relative to removing a parish seat in one of the parishes it was required of the police jury to proclaim the result of the election. Act 33 of 1888.

This court determined that the result of the election should be officially announced, and gave its special sanction to the enforcement of that provision of the act.

We quote from Davis, Mayor, vs. Police Jury, 42 An. 971:

"It is evident that no compilation of the votes, as contemplated and required by Act 33 of 1888, was made. No result was declared

or proclaimed by any order or vote of the police jury. State ex rel. Davis vs. Police Jury, 43 An. 1010.

The functions of police juries and city councils in the matter of holding special elections are of importance.

In the absence of statutory authorization to the courts in determining contests in matter of election much is left to them in determining whether or not a special tax has been voted.

The extent of the authority is interpreted in a number of cases. 13 An. 89; 41 An. 846; 43 An. 1009; 44 An. 863.

In the case at bar these decisions are referred to as supporting plaintiff's contention that this court is without authority over contested election to determine the result.

This emphasizes the importance on the part of these bodies of complying strictly with the forms prescribed, and of their not treating as merely directory the compilation of the votes they should make and the official proclamation of the result.

It may be asked, what is the practical usefulness of the ruling?

The answer at once suggests itself. It is a compliance with the law's requirement.

Moreover, it places the seal of approval on the different acts preceding the proclamation; keeps a record of that of which a record should be kept; a memorial of a levy of taxes, of the different steps taken in lending aid to improvements, of which a community should have a complete and ready reference.

There is safety in adhering to the letter of the statute in the exercise of a comprehensive grant of power, such as that conferred upon the municipalities in the imposition of special taxes by submitting the levy to a special election.

The conclusion is well supported; official promulgation should be made, and a record kept of the promulgation.

The duty concerns the corporation, the tax-payer and the party contracting.

For reasons assigned it is ordered and decreed that the judgment appealed from be annulled, reversed and avoided, and plaintiffs' suit is dismissed without prejudice to any legal right they may have to take such legal proceedings as the law may allow to compel the City Council to promulgate the election.

Plaintiff and appellee to pay the cost of both courts.

CASES

ARGUED AND DETERMINED IN THE

SUPREME COURT OF LOUISIANA,

AT OPELOUSAS,

IN

JULY, 1893.

JUDGES OF THE COURT:

HON. FRANCIS T. NICHOLLS, *Chief Justice.*

HON. CHARLES E. FENNER,
HON. LYNN B. WATKINS,
HON. SAMUEL D. McENERY,
HON. JOSEPH A. BREAUX,
} *Associate Justices.*

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No. 1429.

STATE OF LOUISIANA VS. FRANK JACKSON.

1. Although special charges tendered by an accused may contain correct expositions of law, the court can not be called upon to submit them when there is no evidence in the case to which they are applicable; and on the other hand, even though a single sentence of a judge's charge may have stated too broadly a proposition of law, that fact would not justify a setting aside of the verdict where there is reason to believe that the jury was not misled, and that, as applied to the facts of the particular case, it was correct.

APPEAL from the Eighteenth District Court, Parish of Terrebonne. *Caillouet, J.*

E. B. Dubuisson, District Attorney, for the State, Appellee.

J. C. Briant and *H. M. Wallis, Jr.*, for Defendant and Appellant.

The opinion of the court was delivered by

NICHOLLS, C. J. The defendant indicted for murder, having been tried and convicted of the crime and sentenced to be hung, has appealed. His hope of reversal rests on two bills of exception.

The first is as follows: Be it remembered, that on the trial of the above entitled and numbered cause evidence having been admitted to show that just previous to the homicide accused had been violently struck over the head by a person other than the deceased and that thereupon accused went quickly to his house, some three or four acres from where the assault took place, and, arming himself with a gun, was returning to where he was assaulted, and that on his way deceased attempting by friendly means to prevent him from going there—accused having warned deceased not to approach him, and deceased, in disregard of this warning, having continued toward the accused, the latter shot and killed him. H. N. Wallis, Jr., and J. C. Briant, of counsel for defendant, asked the court to give the following special charges to the jury:

1. "That an illegal attempt to restrain a man's liberty, even under color of legal process, is such provocation as to reduce the offence to manslaughter. This holds where a man is injuriously restrained of his liberty, as where a creditor stood at the door of his debtor with a drawn sword to prevent him from escaping while he sent for a bailiff to arrest him, or where a sergeant put a common soldier under arrest, who thereupon killed the sergeant with a sword, and upon the trial the articles of war were not produced, nor any evidence given of the usage of the army, and so no authority in the sergeant appeared."

2. "Where the defendant having been violently beaten and abused, made his escape, ran to his house eighty yards off, got a knife, ran back, and on meeting with the deceased stabbed him, it was held but manslaughter."

"And the court having refused to give such special charges on the ground that he would thereby comment upon the facts of the case, the said H. M. Wallis, Jr., and J. C. Briant, of counsel for the defendant, did thereupon reserve this bill of exception to the ruling of the court, which bill being submitted to opposite counsel and found correct was duly granted and signed in open court."

The court stated as to this bill that "both charges were refused because even if absolutely correct in point of law the facts of the case

did not warrant either of them. The evidence bearing on the killing of the deceased, Geo. Bisland, was that the accused had some difficulty with one Labit at a plantation store. As to the origin of this difficulty there was contradictory evidence. Some witnesses testify that Labit and the accused began tussling in fun; that Labit requested the accused to desist and behave; that accused did not desist, and in their tussling they both fell down the gallery of the store; that Labit claimed the accused had struck him first. After they fell off the gallery some of the accused's friends started to take him (accused) away from the store, Labit came up with a friend, both armed with axe handles. That some of the accused's friends requested them to go away; that Labit said he would strike him (the accused's friend) if he did not look out; that thereupon accused's friend turned the accused loose and Labit began striking the accused over the head with the axe handle, whereupon a struggle ensued in which the accused succeeded in wresting from Labit the axe handle, when Labit ran back towards the store, the accused pursuing. Labit secured himself in the store and accused threw down the axe handle and started towards his house in the quarters, some three or four acres off. Some witnesses say he walked fast; others that he went in a dog trot.

"He was covered with mud and blood which flowed from gashes in his head, his wife followed, screaming and calling out for some one to go into the accused's house and take his gun from there so the accused could not get it. One or two men went into the house ahead of the accused and looked for the gun, but not finding it came out again. The accused went into the house and came out with the gun and started along the road in the quarters of the plantation towards the store. His wife and others called out to the men in the quarters to stop the accused, to prevent him from going to the store, as he would shoot Labit with his gun. As he neared George Bisland's house, George Bisland stepped off his gallery and walked towards the accused, saying to him: Brother Frank, don't do that, listen to me and go back with your gun. The accused ordered him to stand back, saying he would kill any son of a bitch who laid his hand on him. George Bisland, the deceased, continued on, walking toward him, talking to him in a persuasive way and trying to dissuade him from proceeding further with his gun. When they got within three or four feet of each other, the accused again told him to stand back

and he snapped one barrel of his gun on him. George Bisland kept on talking to him in a persuasive manner and advancing on him, when accused stepped back a step or two and fired a fatal shot into the lower abdomen of George Bisland. George Bisland then grabbed the barrel of the gun and continued entreating the accused to desist from his intention of going to the store with his gun. The accused called out to him to let go the gun, and a struggle ensued for the gun in which the accused struck the deceased on the forehead. At this time a woman came to George Bisland's assistance, and the accused, the gun having been freed from the hold of Bisland, struck her with the gun and kicked at her. At this time it was discovered that George Bisland's clothes were on fire and that he was shot and wounded. The accused then went back to his house, and coming out was seen to go through motions as if reloading the gun (a breach-loading gun), and he went back to the front of the store where he had been beaten with an axe handle and inquired for *the man*, evidently meaning Labit.

"Under the above state of facts the court refused to give the first special charge asked, because there had been no restraint used by the deceased, who was, on the contrary, peaceably engaged in the laudable attempt to dissuade a friend from committing a felony; and the second special charge, for the reason, also, that it had no application to facts of the case, as the accused never had any difficulty with the deceased, much less had he beaten him. The evidence showed that at no time the accused carried the stock of his gun to his shoulder, either when he snapped or when he fired."

The second bill declares: "That on the trial of the cause, the court charged the jury that the provocation, in order to reduce the homicide from murder to manslaughter, must come from the party with whom the accused had the difficulty, and that provocation from any one else would not be sufficient for that purpose, whereupon counsel for defendant did reserve this bill of exception."

The statement of the district judge is as follows: "The facts of the case are detailed in another bill of exceptions filed with this, and I refer to them in connection with this bill as explanatory of the charge given and complained of, which was to the effect that if one in the heat of blood and passion upon due and adequate provocation killed another, it would reduce the crime from murder to manslaughter; but in order to reduce the homicide to manslaughter, the

just and adequate provocation giving rise to the heat of blood and passion must have been given by the deceased. That provocation given by one person to the accused giving rise to heat of blood and passion did not authorize the accused to attack and kill another person, and claim that he was acting in the heat of blood and passion in order to reduce the homicide to manslaughter, unless the excitement and passion were of such a nature as to utterly dethrone reason. What is adequate provocation had been previously defined, and from the statement of facts given in the other bill, that deceased had not given any provocation to accused to cause heat of blood and passion. In the same connection the jury had been charged on insanity."

The entire evidence in this case went without objection to the jury. The facts are known to us only in so far as we find them stated in the bills of exception. Taking these recitals as true, the judge's action in ruling adversely upon the special charges submitted to him was clearly correct.

There was no attempt on the part of the deceased to illegally restrain the accused of his liberty, either under color of legal process or otherwise, and therefore a charge based, as was defendant's first proposition, on the hypothesis of such an attempt, would have been totally unsupported and unwarranted. What is called the second special charge was nothing more than a request that the judge should announce to the jury that on some occasion, not particularized, where a defendant who had been violently beaten and abused made his escape, ran to his house eighty yards off, ran back and meeting with the accused stabbed him, his act had been declared to be not murder, but manslaughter.

Assuming that such a decision had been at some time rendered, the judge very properly refused to refer to it—it must have rested on special exceptional circumstances and fixed and announced no principle; if any was deducible from it, the principle and not the decision should have been advanced and urged. There was, however, nothing in the case at bar under the statement of facts as given upon which the court could have been called upon to charge upon the law of manslaughter and to make his failure to do so ground of reversible error. There was no evidence in the case tending to reduce the crime below the grade of murder.

The judge was not requested to deliver a written charge. The

only portion of it objected to by defendant's counsel is a single sentence wrenched from the whole. Though the particular sentence brought to our notice might, under some circumstances, be found to be too broadly stated, we have no reason to believe that, when taken in connection with other portions and the evidence to which it was to be applied, the jury was misled, and we are of the opinion that the accused was not prejudiced.

Judgment affirmed.

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No. 1440.

THE STATE OF LOUISIANA VS. LEONARD ASHLEY.

1. The decisions in cases of State vs. Onmacht, 10 An. 198, and State vs. Mason, 32 An. 1218, affirmed and applied.
2. A special charge to the effect "that to find the accused guilty of murder, it is necessary that a malicious intent to kill existed at least five minutes before the killing," was correctly refused. There is no human gauge by which the duration of intent can be measured. If the killing was with the malicious intent to kill, the case was one of murder, although that malicious intention was formed at the moment of striking the fatal blow.
3. A charge which assumes that drunkenness is so inconsistent with malice that when shown to exist at the time of the killing, it becomes the duty of the State to seek for it at a period anterior to the drunkenness and to show affirmatively that the drinking was for the purpose of committing the deed, is palpably false.
4. It does not necessarily follow that a homicide was not murder because done in sudden passion. There are many cases where that fact would entitle an accused neither to an acquittal nor to a verdict of manslaughter.

APPEAL from the Twenty-first District Court, Parish of St. Charles. *Rost, J.*

E. B. Dubuisson and *Gervais Léche*, District Attorneys, for the State, Appellee.

R. McCulloh for Defendant and Appellant.

The opinion of the court was delivered by

NICHOLLS, C. J. The defendant was indicted for murder, tried, convicted and sentenced to be hung. He has appealed. He asks a setting aside of the verdict and judgment on the ground that the court erroneously refused to charge the jury as requested by him in

three special charges submitted to him, and on the ground that the record does not show that the indictment was found by the grand jury and returned into and presented by them in open court. The last objection urged is presented under an assignment of error—the former in a bill of exception reserved.

The particular error assigned is not tenable. The record, though made up in a very unsatisfactory and careless manner, is not so much so as to call for a reversal. See the cases of State vs. Onmacht, 10 An. 198; State vs. Mason, 32 An. 1018.

The special charges refused were as follows:

1. That to find the accused guilty of murder it is necessary that a malicious intent to kill existed at least five minutes before the killing.

2. That if the jury find that the accused was drunk and under the influence of liquor at the time of the killing, there can be no malice aforethought as charged and consequently no murder unless the accused drank for the purpose of committing the deed.

3. That the killing in the heat of blood or passion is not murder and the jury must take into consideration whether the accused was in liquor or not so as to become more easily violently angry.

In respect to his action and ruling the judge says: The jury was charged fully upon the law of murder, and specially as to malice, express or implied, and the court refused to charge the first special charge because the question of how long the malicious intent had existed was a matter of fact for the determination of the jury.

The court refused to charge the special charges second and third in the form presented because they were not considered good law as to matters of drunkenness. The court had explained fully to the jury the difference between murder and manslaughter and the law applicable to both, and with this reservation the bill is signed.

The contention of the accused that "in order to find him guilty of murder it was necessary that a malicious intent to kill should have existed at least five minutes before the killing" is utterly without merit.

If the malicious intent to kill exists at the time of the killing it is enough.

On this subject Wharton, in his "Law of Homicide," § 32, says:

"No human gauge existing by which duration of intent can be measured, we are obliged to resort for this purpose to the same

probable reasoning by which the existence of intent is proved. A shoots B in the public streets without authority and without provocation. As reasonable beings usually premeditate any important step they take, we infer that A premeditated this shot, and this inference is sufficient proof on the lack of all other evidence of premeditation. This is what is meant by the expression we frequently meet with in the books that instantaneous intent is enough. It is not meant by this that it is enough if the defendant formed the intent coincidentally with the blow, for this we have no way of determining. What is meant is that even where we have no other proof of intent prior to the blow, from the blow we may infer the intent; hence it is constantly laid down that intent at the time of killing is enough. It is not intended to assert by this that a person who, under a sudden impulse, kills another is guilty of murder. To say this would be unwarranted for the reason that we have no means of saying that a particular impulse is sudden. What we have a right, however, to say, and what the law means by this maxim to say, is this, that when a homicide is committed by weapons indicating design, then it is not necessary to prove that such design existed at any definite period before the fatal blow. From the very fact of a blow being struck, we have a right to infer (as a presumption of fact but not of law) that the blow was intended prior to the striking, although it may be at a period of time inappreciably distant." In the leading case of People vs. Clark, 7 N. Y. 385, the charge was "If the jury believed the killing was with the intention to kill, though that intention was formed at the moment of striking the fatal blow, it was murder," and the chief justice in delivering the opinion of the court said: "If there be sufficient deliberation to form a design to kill and to put that design into execution by destroying life, there is sufficient deliberation to constitute murder, no matter whether the design be formed at the instant of striking the fatal blow or whether it be contemplated for months." See also Wharton on Homicide, § 180.

It will be observed that in the charge submitted, the existence of the malicious intent to kill at the moment of the killing is admitted and it is claimed that this intent should have existed for a definite period prior to the same.

The second charge assumes that the fact that a person is drunk at the time of his killing another is so inconsistent with the idea of malice that it becomes the duty of the State to trace the existence

of malice to a period anterior to the drunkenness and to show affirmatively that the drinking was for the purpose of committing the deed, otherwise there can be no murder.

This position is so palpably false as to need no particular discussion.

In Pirtle vs. The State, 9 Hump. Rep. 663, Judge Turley in delivering the opinion of the court said: "It will frequently happen, necessarily when the killing is of such a character as the common law designates as murder and it has not been perpetrated by means of poison or by lying in wait, that it will be a vexed question whether the killing has been the result of sudden passion, produced by a cause inadequate to mitigate it to manslaughter, but still sufficient to mitigate it to murder in the second degree if it be really the true cause of the excitement, or whether it has been the result of premeditation and deliberation, and in all such cases whatever fact is able to cast light upon the mental *status* of the offender is legitimate proof, and among others that he was at the time drunk; not that this will excuse or mitigate the offence if it were done wilfully, deliberately, malignantly, maliciously and premeditatedly (which it might well be, though the perpetrator was drunk at the time), but to show that the killing did not spring from a premeditated purpose, but sudden passion and heat to the point of taking life without premeditation and deliberation."

Wharton, referring to this decision, says: "Here the court especially lays down the rule to be that in all cases where the question is between *murder* in the first and murder in the second degree, the fact of drunkenness may be proved to shed light upon the mental *status* of the offender and thereby to enable the jury to determine whether the killing sprang from a premeditated purpose or from passion excited by inadequate provocation. And the degree of drunkenness which may then shed light upon the mental state of the offender is not alone that excessive state of intoxication which deprives a party of the capacity to frame in his mind a design deliberately and premeditatedly to do an act: for the court says that in the state of drunkenness referred to a party may well be guilty of killing wilfully, deliberately, maliciously and premeditatedly, and if he so kill he is guilty as though he were sober. The principle laid down by the court is that when the question is, can drunkenness be taken into consideration in determining

whether the party be guilty of murder in the second degree, the answer must be that it can not; but when the question is, what was the actual mental state of the perpetrator at the time the act was done—was it one of deliberation and premeditation—then it is competent to show any degree of intoxication that may exist, in order that the jury may judge, in view of such intoxication in connection with all the other facts and circumstances, whether the act was premeditatedly and deliberately done."

The complaint which the defendant urges before us is not that the court excluded evidence on the subject of intoxication for the purpose of showing the actual mental state of the accused at the time the act was done, in order that the jury might determine whether in view of intoxication in connection with all the other facts and circumstances the act was such as to call for a verdict of murder, or whether one of manslaughter, or whether if calling for a verdict of murder it should be an unqualified verdict, carrying with it the death penalty, or a qualified verdict entailing imprisonment for life. If defendant had testimony bearing on that subject it was permitted to be introduced and went before the jury, and being before the jury the court would have acted unjustifiably had it given the charge requested.

The third charge was faulty in assuming that the killing was in the heat of blood and sudden passion, and it would most certainly have misled the jury. The proposition advanced that because a homicide is committed in sudden passion that, therefore, necessarily it is not murder is not law. There are many cases where that fact would entitle an accused neither to an acquittal nor to a verdict of manslaughter.

Judgment affirmed.

No. 1450.

THE STATE OF LOUISIANA VS. JOSEPH B. RODRIGUES ET ALS.

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1. There is no occasion for the postponement of the trial of a motion for a change of venue, to enable an accused to obtain the attendance of an absent witness, and cause his testimony to be reduced to writing for the purpose of having same annexed to a bill of exceptions, when the trial judge concedes the statement as made, and actually incorporates same into defendant's bill of exceptions. Had there been a difference of opinion as to the facts such witness could swear to if present, the accused would have had the right he claimed.

2. In case the accused desires a witness to be called and sworn on the trial of such a motion, and it appears that he is, at the time, on a jury having under consideration an important criminal case, the judge exercises proper discretion in refusing such application, the testimony being of like character as that of numerous other witnesses residing in the same ward of the parish who had been already sworn, and, therefore, only cumulative.
3. An immaterial and trifling variance between the copy of the *venire* that is served on the accused and the original jury list will not vitiate the service.
4. The allowance *vel non* of a continuance of a criminal cause is matter for the sound judicial discretion of the trial judge, upon the case made on the defendant's motion, and its exercise will not be disturbed except for cogent and manifest error.
5. An offer of compromise of a crime, unaccepted by the prosecutor, may be proven by the State as an admission of guilt, or as disclosing possession of the property which is the subject of the burglary and larceny charged in the indictment.
6. The ruling of the trial judge, disallowing a new trial, will not be examined and passed upon, unless a bill of exceptions is reserved to its refusal.

APPEAL from the Eleventh District Court, Parish of Acadia. *Perrault, J.*

E. B. Dubuisson and *E. P. Veazie*, District Attorneys, for the State, Appellee.

Philip S. Pugh and *Chas. W. DuRoy* for Defendants and Appellants.

The opinion of the court was delivered by

WATKINS, J. The two defendants, Theogene LeBœuf and Octave LeBœuf, were jointly indicted with J. B. Rodrigues for the crimes of burglary and larceny in one court, tried jointly, found guilty and sentenced to seven years' imprisonment at hard labor in the State penitentiary. Rodrigues having "turned State's evidence," the complaint as to him was *nolle prosequied.*

The two convicted defendants prosecute this appeal, relying on several bills of exceptions taken at different stages of the proceedings.

I.

The *first* bill of exceptions relates to the absence of a witness of the defendants whose testimony they desired to procure on the trial of their application for a change of venue. Said witness being called, and found absent, their counsel desired that a note of evidence on the evidence book be left open until the testimony of the

absent witness could be procured, or the motion be assigned for a different day for that purpose, it having been ascertained that the witness' absence was occasioned by the sickness of his wife. This application having been refused, counsel retained a bill of exceptions, and the trial judge assigned as his reason for thus ruling that the facts stated were known to the court and admitted by the State, and that they could be incorporated in a bill of exceptions when presented, and hence it was unnecessary to waste the time of the court on taking testimony upon admitted facts. He further stated that he refused to defer the trial of the motion to another day, because there were a number of witnesses summoned, and in attendance on the court, and from the same portion of the parish as the absent witness, whose testimony was of like character as that which was attributed to him, and consequently his statement would only be cumulative.

In this we can perceive nothing of which the accused have any ground of complaint.

II.

The *second* bill relates to the judge's refusal of the request of the accused to have a certain other witness called to the stand to testify on the same motion, notwithstanding said witness was in the court-house at the time. The judge assigns as his reason for refusing this request that the witness mentioned was at the time a juror on the regular panel, and was a member of a petit jury sitting on the trial of an important criminal case which had been submitted to them and which was then undetermined, and he, consequently, deemed it improper to have him called into court and disturb the jury in their deliberations, when the testimony of this witness would have been of like character and tenor as that of numerous other witnesses who had already been heard—his testimony being merely cumulative.

Of this ruling the accused had no ground of complaint.

III.

The *third* bill relates to the declination of the judge to postpone the trial of the cause, on the ground that a true and correct copy of the *venire* had not been served upon them, in that the name of one of the jurors on the copy served was written *Aniste* Dupont, whereas it appears on the original as *Lavaniste* Dupont; and further, that said alleged copy of the jury list as served did not have the proper cer-

tificate; and further, because the name of George E. *Brooks*, one of the jury commissioners, was styled George E. *Burke* on the copy that was served upon them.

These objections to the service were held inadmissible by the judge and the trial was ordered to be proceeded with for the following reasons, viz.:

1. Because a certified copy of the indictment and of the *venire* had been served.

2. Because same had been *properly* certified.

3. Because the complaint of the name of the jury commissioner, *Brooks*, being incorrectly given as *Burke*, was a mere typographical error, and could not result injuriously to the defendants; and, in addition, the certificate of the jury commissioners did not form any part of the *venire* which the law required to be served on an accused; and hence this part of the objection is frivolous.

4. That the name of the juror, *Lavaniste* Dupont, having been written *Aniste* Dupont on the copy of the *venire* which was served on the accused is inconsequential, and could not affect the legality of service, because the name was correctly written on the *original venire*, and that the omission of the first syllable of the name, to-wit: "*Lav*" was the result of accident. But even if this objection were otherwise fatal to the service, no possible injury could have resulted to the accused, because this particular juror did not serve on the jury of trial—citing 11 An. 81; 2 An. 732; 25 An. 573; 39 An. 229; 35 An. 975.

In our opinion, the trial judge satisfactorily and correctly disposed of the objections urged and properly declined to postpone the trial of the cause.

IV.

The *fourth* bill relates to the judge's refusal to grant the accused a continuance when the case was called for trial, because of the absence of certain of their witnesses.

For this ruling the trial judge appends to the bill the following as his reasons, viz.:

1. Because, in his opinion, the application was made simply for delay and not to enable the accused to obtain substantial justice.

In substantiation of his opinion he cites and relies upon the various pleas that were urged by the counsel for the accused, and which had

already been overruled by the court—and amongst them those discussed in the preceding bills of exception, and all of which he styles "frivolous pleas and objections."

He further states, as an additional reason for his ruling, that one of the absent witnesses named was an uncle of one of the accused, who was absent at the time in an adjoining parish on a fishing excursion, and had thus absented himself a *week prior* to the date which defendant's counsel had made his order for summonses to issue for their witnesses, *and to the knowledge of the defendant for whose account he was to be summoned, and possibly at his suggestion.*

He further states that the accused was not prejudiced by the absence of another witness named, for the reason that another witness was summoned for the purpose of proving the same state of facts as that alleged to have been within the knowledge of the absent witness; and consequently, if this testimony was obtained it would only be cumulative and corroborative—citing Fremaux case, 39 An.

He further states that two other witnesses named were citizens and residents of another parish, and to the knowledge of the accused at the time application for a continuance was made, because said witnesses resided at no great distance from the accused; and, considering the great importance of the testimony of said witnesses to the accused, "they were guilty of gross negligence in not ascertaining the parish wherein they resided, and did not use ordinary diligence, much less due diligence, to procure their presence"—citing 36 An. 854; 6 An. 554; 25 An. 525; 28 An. 46; 30 An. 1176; 31 An. 179; 33 An. 1110; 34 An. 381; 36 An. 81, 153, 291; 39 An. 214; 1 Bishop, Crim. Prac., Sec. 951.

He further states that neither of the accused had prefaced their application for a continuance with an application for compulsory process against said absent witnesses for the purpose of obtaining their attendance, and consequently it was matter within the competency and discretion of the court to determine whether a proper case for continuance had been made on the defendant's application; and, in his opinion, there was no such proper case made out—citing 14 An. 785; 28 An. 46; 33 An. 679; 37 An. 128; Whar. Crim. Pl., Sec. 547.

The judge cited other reasons that influenced his decision in part, but those already recapitulated being, in our opinion, ample, it is unnecessary to state them.

We think it evident that the trial judge, in refusing to grant a continuance to the accused under the facts and circumstances detailed, acted within the bounds of his judicial discretion and committed no error in so doing.

V.

The *fifth* bill of exceptions appertains to the judge's declination to reject and disallow proof of a *proposed* compromise of the prosecution that was alleged to have been made by one of the accused, and which proof the State offered to make as an acknowledgment of the guilt of said accused—the proposed compromise having been altogether unsolicited on the part of the prosecutor, and having also been declined by him.

The objection of the defendant's counsel was, that this testimony, if received, would have a tendency to show the accused in question guilty of having received stolen goods, a crime not charged in the indictment, instead of showing him to be guilty of burglary and larceny, as charged against him in the indictment.

The judge assigns as his reason for overruling the defendant's objection and admitting the testimony, that the proposed compromise was, in effect, a confession voluntarily made, and was consequently admissible against this particular accused—the jury having been instructed to the effect that it could not be considered as having any application to the other accused.

He further assigns as a reason for his ruling, that it is competent at all times in a prosecution for burglary and larceny for the State "to show that the property stolen was found in possession of a defendant recently after the commission of the crime, whereupon the onus is (placed) upon him to satisfactorily account for the way he (became) possessed of the property, (as) in the absence of such *satisfactory* account, guilt is presumed."

It is quite evident that this testimony was legally admissible on either one or both of the grounds that the trial judge assigned for its reception. If a contrary rule were established, it would be an easy matter for persons thus accused to attempt to procure immunity from prosecution, and failing of success, to suppress the testimony the offer afforded of their guilt.

VI.

The *sixth* bill relates to the refusal of the trial judge to permit the introduction in evidence of certain proofs of misconduct of certain

members of the jury of trial, in the course of the disposition of defendant's application for a new trial. This ruling is of no consequence, and it is one of several rulings of like character that is complained of, in view of the conclusions we have reached in reference to the next and last objection that is urged upon our attention.

VII.

After a tedious and protracted trial and the rendition of a verdict of guilty, the accused made an elaborate application for a new trial, assigning various grounds; but an examination of the record discloses that no bill of exceptions was retained by the accused to its rejection and disallowance by the trial judge.

In the brief furnished by the district attorney, our attention is called to that fact, and also to the decisions of this court, to the effect that in such case the ruling of the trial judge will not be examined, notwithstanding the evidence that was adduced on the trial of such application is in the transcript, it being an indispensable prerequisite to an examination of such evidence, that a bill of exceptions should have been taken and retained to such ruling *and* the evidence thereto annexed, or substantially embodied in the bill.

That such has been and now is the accepted course of decision by this court is sufficiently attested by the opinions we find collated in his brief. State vs. Given, 32 An. 782; State vs. Nelson, 32 An. 845; also 32 An. 856, 1052, 857; 36 An. 310, 770; 37 An. 467; State vs. Williams, 35 An. 742; 38 An. 684; 39 An. 667.

To this list might be added quite a number of other cases, but it is deemed unnecessary.

After a careful examination and analysis of the various bills of exception and of the reasons assigned by the lower judge, we have reached the deliberate conviction that the accused has have a fair and impartial trial.

This large and voluminous record attests that the accused were rigorously prosecuted and earnestly and well defended, but it discloses no error for which they are entitled to relief at our hands.

Judgment affirmed.

No. 1430.

THE STATE OF LOUISIANA VS. WILLIE FOREMAN.

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1. Although applications for certiorari to supply deficiencies of record ordinarily come too late after submission, yet under the particular facts of this case, and considering that defendant's assignment of error availing of these defects was itself filed only after submission, the application is allowed, on the ground tha defendant's laches excuses the laches of the State.
2. Applications for change of venue on the ground of local prejudice are addressed to the sound discretion of the trial judge, and if he has not manifestly abused that discretion this court will not interfere with his ruling. When the evidence taken is contradictory and inconclusive, and when the judge bases his ruling not only on the evidence, but on his own knowledge of the facts and circumstances, it would require a very extreme case to authorize our interference.
3. Sec. 7 of Act 44 of 1877 imposes no duty on the district judge as to requiring the jury commission to draw additional jurors as talesmen, but simply authorizes him to do so "whenever he thinks proper," and of course his refusal to make such order is final and not reviewable here.
4. The other bills of exception are based on statements embodied in the bills which are denied by the trial judge, who makes his own statements which entirely destroy the exceptions and which must be accepted by this court.

APPEAL from the Seventeenth District Court, Parish of Lafayette. *Allen, J.*

E. B. Dubuisson, District Attorney, for the State, Appellee.

Wm. Campbell and *Jos. A. Chargois* for Defendant and Appellant.

The opinion of the court was delivered by

FENNER, J. This case stood second on the docket of the court at the opening of the term and was called and submitted immediately after the court opened its first session. After said submission counsel for defendant filed an assignment of errors apparent on the face of the record, amongst which that the transcript failed to show the arraignment of the defendant and his presence during the trial. The district attorney thereupon promptly filed an application for certiorari to complete the record, alleging that the case had been submitted prematurely and in error, and that in the hurry and press of official duty the defects in the record had escaped attention, and were only discovered when defendant's assignment of errors was filed, which was only done after the submission. The petition for

certiorari was duly notified to defendant's counsel, and the writ was issued without prejudice. Though said counsel verbally stated, in open court, in answer to a question of the court, that they did not consent to the certiorari, they have not made any formal objection or submitted any grounds of opposition thereto. In answer to the certiorari, the clerk of the District Court has sent up a certified copy of the proceedings which were omitted from the original transcript, and which completely supplies all the defects complained of. They make it clear that, in point of fact, the proceedings in the lower court were in all respects regular, and that the appearance to the contrary on the face of the original record was due simply to the omission of the clerk to include therein a copy of the minutes of the proceedings. There is no question of the right of the State to correct such omissions by timely application for certiorari and, under the circumstances of this case and in consideration of the fact that the defendant's assignment of errors was only filed after submission, we think the premature submission should not deprive the State of the right of correction. Defendant's own laches excuses the laches of the State, and precludes him from objecting to have the validity of the proceedings, under which he was tried, determined according to the truth and fact thereof, and not according to a false simulation of non-existent irregularities appearing as the result of mere official negligence of the clerk.

The errors complained of are presented in four bills of exception, which we will consider in their order.

The first bill is reserved to a ruling of the court refusing a change of venue on the ground of prejudice in the community which would prevent a fair trial. Evidence was taken, which is brought up as part of the bill of exceptions, and we have carefully considered it. It is contradictory and inconclusive, and the judge, in his reasons, states: "The evidence adduced and my knowledge of the facts and circumstances surrounding the case convinced me that the defendant could obtain a fair and impartial trial in the parish of Lafayette." Applications for change of venue are addressed to the sound discretion of the trial court, and unless an abuse of such discretion be clearly shown, his decision will not be interfered with. State vs. Gonsoulin, 38 An. 489; State vs. Daniels, 31 An. 91; State vs. White, 30 An. 364.

We could not say, on the face of the evidence itself, that the judge

had abused the discretion vested in him, and his conclusion, being also based on his own knowledge of the facts and circumstances, is entitled to additional weight and consideration which entirely prevent our disturbing it.

The second bill is taken to the refusal by the judge of a motion to require the jury commission to draw additional jurors as talesmen, which denial is claimed to be in violation of Sec. 7 of Act 44 of 1877. The point is meritless. A reference to the section shows that the propriety of such requirement is subjected to the unqualified discretion of the judge and is only to be exercised "whenever the district judge thinks proper." The judge gives excellent reasons why he did not think it proper in this case; but if he had given none his action would not be subject to review by this court.

The third bill, which was taken to the sustaining of a challenge for cause of a juror by the State, whatever merit it might have under the statement embodied in the bill, is absolutely shorn of all force under the statement made by the judge, and does not need further discussion.

The fourth and last bill was taken to a ruling permitting the district attorney to contradict and impeach one of defendant's witnesses by admitting proof that said witness had made a certain statement when the witness had not denied the making of such statement, but had only said that he did not remember making it; but the judge says he had, in effect, denied making the statement, because, after saying he did not remember, he added: "When I say I do not remember a thing I mean that it is not so; when I say that I do not remember what you ask, I mean that I did not say that to Clark." This is the entire equivalent of an absolute denial, and opened the door to contradiction.

A careful scrutiny of the record reveals no ground for reversing the proceedings.

Judgment affirmed.

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No. 1435.

H. B. HEWES ET ALS. VS. JOHN P. BAXTER, TESTAMENTARY EXECUTOR.

ON MOTION TO DISMISS.

Defendant is not affected by a declaration in a judgment that it is in his favor when in reality it is against him. He has the right to appeal from it to correct any errors. 8 An. 362; 2 An. 182.

ON THE MERITS.

1. Where defendants in a partition suit except that one of the co-plaintiffs who alleges himself to be the natural tutor of his minor child is not such, and on the trial of their exception show that although, under an order of court authorizing the father to qualify as tutor, he had taken an oath as such; that he had never caused, as the law requires, the abstract of inventory of the minor's property to be recorded, which protects the minor through a mortgage; and that no letters of tutorship had ever been issued, the exception should be sustained as to this co-plaintiff, who should be dismissed from the suit, and it should be remanded to be proceeded with according to law.
2. The fact that, on the application of a father so claiming to be tutor, a family meeting had been called by the court to consider whether the father as tutor should institute a partition suit—that it had recommended that he should do so —that its deliberations had been homologated and the suit authorized to be brought by the judge will not cut the defendants, who are third parties, off from their rights of protection against possible sacrifice of the property and future litigation arising from proceedings of questionable validity.
3. Defendants in partition suits having direct substantive rights of their own and interested not only in the price to be obtained, but in the title to be conveyed, by reason of their continuing obligations as co-vendors of the property to be sold, have the right to insist that proceedings of doubtful legality which have not yet reached consummation but are in process of formation should be placed securely beyond the danger point and not permitted to pass on to finality.

APPEAL from the Nineteenth District Court, Parish of Iberia. *Voorhies, J.*

Foster & Broussard and *L. T. Dulany* for Plaintiffs and Appellees:

No one can be compelled to hold property with another, unless the contrary has been agreed upon, and any one has a right to demand the division of a thing held in common by the action of partition. C. C. 1289; 43 An. 1118.

All rules established in Chapter 1, Sec. 1 of C. C., except such as relate to collations, are applicable to partitions between co-owners. C. C. 1290; 36 An. 818.

A partition may be sued for by any heirs, testamentary or *ab intestato*, by any universal legatee under a universal title. C. C. 1307.

The action of partition can be instituted by any co-owner holding property in common from whatever cause he may hold, and even by a possessor when his possession is lawful and proceeds from a just title; yet among co-heirs or co-proprietors it is not actual possession of the thing to be divided, but the ownership which forms the basis of the action. C. C. 1308, 1309 and 1320.

After the death of the mother the surviving father is of *right* the tutor of his minor children. C. C. 250.

When the father of the minor becomes the natural tutor, his oath of office is a sufficient compliance with the law and the only precedent condition in order that he may exercise the function of that office. C. P. 949; 10 La. 98; 2 An. 71; 3 An. 362; 20 An. 64; 12 R. 636.

When the petition for appointment sets forth that all the requirements of the law have been complied with, and on the allegations thus made the judge of the court competent to appoint the tutor makes the appointment, it is regular upon its face and can not be collaterally attacked. 5 An. 598; 36 An. 533.

Hewes et als. vs. Baxter.

The appointment of a tutor made by a court of competent jurisdiction can not be regarded as absolutely null and void. 5 An. 182; 25 An. 54; 35 An. 591.

Art. 321, C. C., must be construed with Art. 304, C. C., which last article provides for the removal of a tutor upon his neglect to record the minor's legal mortgage. As the non-recordation of a mortgage is a ground for the removal of a tutor, and as the tutor can not be removed unless he be first appointed, the non-recordation being a ground for removal precludes the idea that the order appointing him was wholly inoperative and void. 36 An. 533.

To institute partition suit on behalf of a minor his tutor must be authorized by the judge on the recommendation of a family meeting. C. C. 1312.

The proceedings of a family meeting recommending the suit and the authorization of the judge based on their recommendation are not void, because the petition for the family meeting was filed one day in advance of the date on which the natural tutor qualified when the order for said meeting was granted on the same day that said tutor qualified, and when said meeting was held on the same day, April 30, 1892, and the proceedings homologated two days later, to-wit: on the second day of May, 1892, and the order of the judge is granted on May 3, 1892.

When the property is indivisible by its nature, or when it can not be conveniently divided, the judge shall order it sold. C. C. 1339, 1340.

Philip H. Mentz and *Walter J. Burke* for Defendant and Appellant:

In a suit for partition all co-owners must be represented or the action will fail. H. D. 1076, No. 7; L. D 504.

The appointment of a natural tutor before the registry of the abstract of inventory and the exhibition of a certificate, showing this, to the judge, is an absolute nullity. Acts 1869, No. 95, Sec. 2; C C. 321; Succession of Arlaud, 42 An. 548.

The tutor is forbidden to enter upon his duties until he shall have taken the oath. R. C. C. 334 and 335; 11 R. 503; 12 R. 636; 3 An. 562; 20 An. 64.

He is equally forbidden to interfere with the property of the minor until letters of tutorship have been delivered to him. R C. C 334 and 335.

In cases involving the alienation of the property of minors an adjudicatee will not be coerced to accept a title suggestive of future litigation. 40 An. 571; 40 An. 847.

In such cases the adjudicatee is not confined to the mere superficial aspect of the succession record, but may inquire into the regularity and propriety of the appointment of the tutor. James vs. Meyer, 41 An. 1100

One who has taken possession of an estate as a succession representative under orders of court provoked by himself can not change the nature and character of his possession by any act purely his own, but must invoke proper authorization of the court under whose appointment he is acting to so change his title and possession. Succession of Townsend, 37 An. 403; 38 An. 861; Webb vs. Keller, 39 An. 65; Succession of Frazier, 35 An. 382; R. C. C. 3446, 3514 and 3441.

Tutorship is a personal trust. 3 An. 318; R. C. C. 315.

The tutor, who is at the same time a succession representative, does not enter upon his functions as tutor *quoad* the property of the estate, nor does the property pass to him as tutor until he has, under proper judicial authorization, terminated his functions as succession representative. Succession of Scarborough, 43 An. 315; same, 44 An. 293.

An executor's first duty is to administer the estate and to reduce it to the *residuum* that belongs to the heirs and legatees; until then, he can not, if tutor, sue for a partition. 19 An. 294; 22 An. 309; 1 R. 111.

The opinion of the court was delivered by

NICHOLLS, C. J. This action is one for the partition of certain property, movable, immovable and credits, in the parish of Iberia, between joint owners.

The plaintiffs are Harry Hewes, Miss Rosa Mary Leitch and J. W. Stokoe, personally and in his capacity as natural tutor of his minor son, Neil W. Stokoe, issue of his marriage with his deceased wife, Mattie J. Stokoe.

The defendant is J. P Baxter, as tutor of the minors Baxter Milmo, Walter Milmo, Gertie Milmo and Bernard Milmo, and also as executor of the estate of Bernard B. Milmo, the father of these last mentioned minors.

Plaintiffs alleged that the property, of which an itemized list and description was annexed to the petition, was owned, held and possessed by petitioners and the before-named minor children of Bernard B. Milmo in indivision and that they desired and demanded a partition thereof.

That the firm of Milmo, Stokoe & Co., to which the said property once belonged, had been dissolved by the death of Bernard B. Milmo and Mrs. Mattie J. Stokoe, partners therein, and a final and full settlement of said partnership had never been made.

That Harry Hewes owned the undivided three-eighteenths of said property; Rosa Mary Leitch (who is a daughter of Mattie J. Stokoe by a first marriage, and a minor duly relieved from the disabilities of minority by a judgment of court), owned the undivided one-fourth of five-eighteenths of said property; that the minor Neil W. Stokoe owned the undivided one-fourth of five-eighteenths; that J. W. Stokoe personally owned the undivided half of five-eighteenths, and that the four minors, represented by their tutor, J. P. Baxter, owned the undivided ten-eighteenths, which they, the only forced heirs, inherited from their father.

That Miss Rosa Mary Leitch and Neil W. Stokoe acquired their interest by inheritance from their mother, Mattie J. Stokoe, which they were seized and in possession of as sole and forced heirs; that there were no debts, and Rosa Mary Leitch accepted unconditionally the succession.

That J. W. Stokoe, as tutor of the minor, Neil W. Stokoe, had caused a family meeting to be convened on behalf of said minor, and that said family meeting, whose proceedings had been homolo-

gated, recommended that on behalf of said minor his tutor institute proceedings for a partition.

That all of said property was of such a nature and kind that it was detrimental to the owners to hold the same in indivision, and that a partition thereof was necessary and that it should be made by licitation.

Petitioners prayed for citation upon Baxter, as tutor and testamentary executor; that there be judgment in their favor recognizing them as co-owners of said property and ordering and decreeing the sale thereof for the purpose of effecting a partition among all the co-owners; that on the part of the majors said property be sold for cash, and so far as the interest of each and all the minors that it be sold upon such terms and conditions as might be recommended by a family meeting convened in their behalf; that experts be appointed to examine into the nature and kind of said property and to report to the court whether or not it was susceptible of division in kind; that an estimative inventory be made of said property; that the judgment ordering the sale also order and decree that the final partition be referred to a notary in order that a partition be made between all the co-owners and according to law; that Stokoe, as tutor of his minor child, be authorized to stand in judgment, as recommended by the family meeting.

On the 3d of May, 1892, the district judge signed an order by which he authorized J. W. Stokoe, as tutor, to prosecute the proceedings and to stand in judgment as the representative of the minor in accordance with the recommendation of the family meeting held in that behalf, appointed experts to examine and report, under oath, the nature and condition of the property sought to be partitioned, and directed the taking of an estimative inventory of the same.

The defendant Baxter, as tutor, filed an exception to the effect that J. W. Stokoe has not and never had been the tutor of Neil W. Stokoe; that the abstract of inventory showing the amount and value of the property of said minor had never been recorded; that no appointment of said J. W. Stokoe as tutor had been made, or if made, that the appointment was absolutely null, void and without effect; that no "letters of tutorship" had ever issued to the said Stokoe from the court, and that he was without appointment or authority of any kind to represent the minor; that at the time he

applied for the convocation of a family meeting to authorize him to bring the suit in behalf of the minor he had not taken the oath required by law, and that he was without authority to petition for the said meeting, and that the holding of the same was without effect of any kind, and that all the proceedings relative thereto were null and void, and that all the parties alleged by the plaintiff to be co-owners of the property sought to be partitioned were not represented. For these reasons he prayed that the suit be dismissed. This exception having been overruled, defendants filed an answer in which, after pleading the general issue, it was admitted that the minor children of Bernard B. Milmo were owners of ten-eighteenths of the property described in plaintiff's petition, but specially denied that J. W. Stokoe had any right or title to any part of the property or that Rosa Mary Leitch or Neil W. Stokoe had ever acquired title to any part of the same. The answer declared that the property belonged solely to the estate of Mrs. Stokoe, deceased; that J. W. Stokoe was the executor of the last will and testament of said deceased, and that the said estate was in her possession solely and exclusively as such executor; that legatees were named in the will; that J. W. Stokoe had never filed any account of his gestion; that he had never distributed the property as required by the last will, and that neither the legatees under said will nor the heirs of the said deceased had acquired title to or possession of said property, and that none of them were owners of any part of the property of said estate; that no orders had ever been obtained by said executor, nor had any petitions asking for such orders ever been presented to any court asking for the distribution of the property or assets of said estate, or for the payment or delivery of the legacies named in the last will and testament of said deceased; that the entire property of said estate still remained as it was at the moment of the probate of the said last will and testament; that title to the property was solely in the said executor in his said capacity, in which capacity he had not the right to sue for a partition. Defendants prayed that the demand be dismissed and for trial by jury.

The case having gone to trial the jury returned a verdict as follows:

"Verdict for defendant. Inasmuch as the property can not be divided in kind, it is our opinion that the sale of said property at public sale in parts would work to better advantage to all parties concerned in this suit." (Signed) John Broussard, foreman.

The court on the verdict as so found rendered the following judgment:

"The above numbered and entitled cause having been duly fixed for trial by jury, and a jury having been duly empaneled and the said cause having been duly taken up and tried before said jury, and the evidence and the law being in favor of the defendants and against the plaintiff, and the verdict of the jury being in the following words, to-wit:

"Verdict for defendant. Inasmuch as the property can not be divided in kind, it is our opinion that the sale of said property at public sale in parts would work to better advantage to all parties concerned in this suit." John Broussard, foreman.

"It is therefore ordered, adjudged and decreed that the property described in plaintiff's petition be sold at public auction by the sheriff of this parish, to effect a partition between them, and that the same be sold in parts, to-wit:

"The land between Main street, in Jeanerette, La., and the Bayou Teche, and the buildings, improvements and machinery thereon, be sold together, and that the steamboat Rose M. Stokoe, the pull-boat, logs, lumber and open accounts, and the lot of land in said town, next to the railroad, be sold separately. It is further ordered, adjudged and decreed that the plaintiff pay the costs of this suit. It is further ordered, adjudged and decreed that a family meeting, composed of the nearest relatives of the minors, co-owners of the property, and parties to this suit, be convened before Lèonce B. Delahoussaye, notary public, in and for the parish of Iberia, for the purpose of fixing the terms of said sale in so far as said minors are concerned and to safeguard their interests."

From this judgment the defendants appealed.

Plaintiffs filed in the Supreme Court a motion to dismiss the appeal, on the grounds—

1. "That the judgment being in favor of appellant *in toto* and ordering just what he asked and wished, so far as the testimony and judgment shows; he has no right to an appeal.

2. "The testimony, evidence and judgment of the lower court and verdict of the jury having granted him what he wished and requested, he, in case of partition under such circumstances, is not entitled to an appeal, and an appeal from a judgment in his favor will be dismissed.

3. "Where there is a judgment in favor of the appellant, granting him the mode and manner of doing what he asks, the appeal taken by him will be dismissed."

The record fails to bear the appellees out in their statements in the motion to dismiss. Defendants have constantly resisted plaintiffs' demand and sought to have it dismissed. At no time have they abandoned their opposition. The fact that the judge in rendering judgment declared that the decree was rendered by reason of the law and the evidence, and the verdict of the jury being in favor of defendants and against the plaintiffs, amounts to nothing in view of the decree itself, which was adverse to the defendants on issues raised and presented by them.

In the case of the Police Jury vs. Succession of McDonogh, 8 An. 362, this court said:

"A party may appeal from a judgment rendered in his favor, and at his own instance, to correct any errors in it."

As a matter of course a mere declaration by either judge or jury, or by both, that a judgment is one in favor of a defendant when in reality it is one against him, can have no effect as against the facts disclosed by the record. There is no merit in the motion to dismiss. The appeal is sustained. 2 An. 182; 8 An. 362.

The defendants and appellants contend most earnestly that the District Court should have sustained the first exception filed by them, which was to the effect "that J. W. Stokoe was not authorized to represent his minor child, for the reason that the abstract of inventory showing the amount and value of the property of the minor had never been recorded, and that if any appointment of said Stokoe as tutor of the said minor had been made (which was expressly denied) said appointment was absolutely null, void and without effect of any kind, and that no 'letters of tutorship' having issued from the District Court he should be held to be without appointment or authority of any kind to represent the minor."

The record shows that on the 29th of April, 1892, J. W. Stokoe filed in the District Court for Iberia a petition in which he alleged that his wife, Mattie J. Stokoe, had died in that parish; that her succession had been opened, and an estimative inventory of her said estate had been made and duly filed and recorded in Iberia parish; that his said wife had died leaving one minor, the issue of her marriage with him, and that said child had inherited part of her estate, and was

the owner thereof; that said minor was named Neil Stokoe, and that he (petitioner) was the tutor by nature and desired to qualify as such, as no tutor had been appointed to represent the minor, and he therefore prayed to be allowed to qualify as natural tutor. We find, on the same day, an order of the district clerk that, "considering the petition, it is ordered that J. W. Stokoe be allowed to qualify as natural tutor to his minor child, Neil Stokoe, issue of his marriage with Mattie J. Stokoe, and that an abstract of the inventory of the property of said minor, as shown by the estimative inventory made on the —— day of ————, 18—, of the estate of J. W. Stokoe (Mattie J. Stokoe?), be duly recorded upon the mortgage books of Iberia parish."

We find that on April 30, 1892, J. W. Stokoe took the oath of office as natural tutor to his minor child, but we find no further order relative to his appointment or confirmation, and no evidence was adduced to show that "letters of tutorship" had ever been issued to him, although that fact was expressly put at issue.

The record further shows that on the twenty-fifth day of April, 1891, an inventory, with appraisement, was made of the property of the succession of Mattie J. Stokoe and filed in the office of the clerk of the District Court on the same day, but that up to the date of the rendition of the judgment in this case in the District Court neither this inventory nor any abstract thereof had been recorded in the mortgage books of the office of the recorder of the parish of Iberia.

Defendants call our attention to *Articles 321 and 335* of the Civil Code, the first of which declares that "in the several cases in which the tutor is not required to give bond it shall be the duty of the clerk of the District Court of the parish in which the appointment is to be made to furnish a certificate of the amount of the minor's property, according to the inventory on file in his office. This certificate must be recorded in the mortgage book of the parish in which the tutor resides, and a certificate to that effect, signed by the recorder of mortgages, must be presented to the judge before he can make the appointment or authorize 'letters of tutorship' to be issued," and the second that "the letters of tutorship shall not be delivered to the tutor until he shall have complied with the law as herein required.

"Until they shall have been delivered to him he shall not interfere with the administration of the property of the minor, except

for the purpose of preserving it in cases which admit of no delay. The tutor is not recognized, confirmed or appointed, nor is he permitted to act as tutor, until the judge renders and signs a decree authorizing letters of tutorship to be issued." The provisions of these two cited articles are combined in Art. 3351 of the Civil Code.

Defendants insist that these articles are mandatory, as conditions precedent to an appointment as or to action as a tutor, and that as resulting from that fact they operate a prohibition against such action, which if taken is null, void and of no effect. They cite several decisions in support of their contention, particularly the succession of Arlaud, 42 An. 548.

Plaintiffs on the other hand, rely upon that of Stackhouse vs. Zuntz, 36 An. 530, and the conclusion reached in that case by this court, construing the articles just copied in connection with Art. 304 of the code, which provides among other causes for the "removal" of a natural tutor, that of his neglect to have had this inventory made and recorded at the time and within the period prescribed by law, which time (as the court then construed it) was that required by the two articles first quoted.

After mature deliberation upon the questions submitted to us for adjudication in this case, we have reached the conclusion that, under the circumstances and conditions in which they were raised, the district judge on the exception filed by the defendant as to the right of J. W. Stokoe to represent the minor, Neil Stokoe, as his tutor or to stand in judgment for him therein, should have sustained the same to the extent of dismissing the said J. W. Stokoe (as representing Neil Stokoe as tutor) as a co-plaintiff from these proceedings.

Defendants as joint owners of the property sought to be partitioned have direct substantive rights of their own entitling them to insist by reason of the same upon having the proceedings so conducted as to cast no cloud upon them which would affect the price to be obtained, or throw a doubt upon the title to be conveyed under them. Their continuing obligations as co-vendors of the property to be sold authorize them reasonably to demand at the hands of the court that proceeding of doubtful validity which have not yet reached their consummation, but are in process of formation, should not be permitted to pass on to finality, but should be forced to be placed securely beyond the danger point.

Without expressing any opinion as to whether defendant's contention, that an appointment by a court of a person as tutor prior to the recording required by law of the abstract of the inventory of the minor's property is an absolute nullity, be well founded or not, or what would be the effect under differing circumstances of acts done by a person acting as tutor under such a state of facts, it is sufficient for us to say that the defendants have brought to our notice a condition of things such as to certainly entitle them to protection. Doubtful questions should be resolved in their favor. Plaintiffs in partition have no right to jeopardize the interests of their co-owners by taking out uncertain proceedings. The failure of the father to have had the abstract of inventory recorded, and after such recording to have had "letters of tutorship" issued to him where such important interests of his child and others were at stake, was inexcusable, and is too likely to be attended by dangerous results not to be checked. For the reasons herein assigned, it is ordered, adjudged and decreed that the judgment appealed from be annulled and reversed, and it is further ordered and decreed that this cause be remanded to the court below and be therein reinstated, without prejudice to the rights of any one, either plaintiff or defendant, and with leave granted to all parties to so reform their pleadings and proceedings as to conform to the law and the views herein expressed; the costs of appeal to be taxed against the appellees, and those of the lower court to await final action therein.

Breaux, J., takes no part.

No. 1434.

HARRY B. HEWES ET AL. VS. JOHN P. BAXTER, TUTOR AND EXECUTOR.

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Same as that in suit of same title, No. —.

APPEAL from the Nineteenth District Court, Parish of St. Martin. *Voorhies, J.*

T. D. Foster, R. F. Broussard and *P. H. Mentz* for Plaintiffs and Appellees.

W. J. Burke for Defendant and Appellant.

ON MOTION TO DISMISS APPEAL.

The opinion of the court was delivered by

WATKINS, J. The grounds assigned for the dismissal of the appeal are that there is no legal bond of appeal furnished in compliance with the order of the judge granting the appeal. Further because the order of court granting the said appeal fixed the amount of the appeal bond at *five thousand* dollars. That subsequently a rule was taken on behalf of the defendant and appellant, commanding plaintiffs and appellees to show cause at the judge's *chambers* why said bond should not be reduced in amount, but same was dismissed, and thereafter the judge made an *ex parte* order reducing the amount of said bond to $500, and without notice to the plaintiffs and appellees —and that such order was illegal and void.

The additional ground is taken that no appeal lies in a partition suit, unless the ownership of some of the joint heirs or co-owners is matter of dispute, and the averment is made that although the defendant in his answer denied that some of the plaintiffs are owners in common, yet in his testimony he admitted the joint ownership of all. The order of appeal is in the alternative granting the defendant a devolutive appeal, fixing the bond for same at $250, and a suspensive appeal, fixing the bond therefor at $5000.

After the granting of the order the defendant applied to the district judge in chambers and procured an order reducing the amount of the *suspensive* appeal bond to $500—not, however, disturbing the amount of the *devolutive* bond. In pursuance of said orders the defendant executed a bond for $500, and instead of furnishing security under an order of court, he substituted that sum of money and deposited same with the clerk of court.

Consequently, if it be conceded that the order reducing the amount of the *suspensive* appeal bond from $5000 to $500 was irregular, yet the bond for $500 is quite sufficient to respond as a devolutive appeal bond. Glover vs. Taylor, 38 An. 634.

On the other branch of the case it is only necessary for us to observe that it is elementary that we can not go into an investigation of a question of evidence that was adduced on the trial in order to determine the dismissibility of an appeal.

Motion to dismiss denied.

ON THE MERITS.

This is a suit for the partition of a large quantity of land situated in the parish of St. Martin, which was formerly the property of a a firm or copartnership styled Milmo, Stokoe & Co., now dissolved by the decease of two of its members, Mrs. M. J. Stokoe and Bernard Milmo. It is instituted by Harry B. Hewes, the only surviving member of that partnership, joined by John W. Stokoe, surviving husband and partner in community of said Mrs. Mattie J. Stokoe, who appears in his own right and as the natural tutor of N. W. Stokoe, issue of their marriage; and also by M. Rose Leitch, an emancipated minor, issue of the same marriage—the latter being a forced heir and universal legatee of Mrs. Stokoe, deceased.

The action is directed against John B. Baxter as dative tutor of the minor children and forced heirs of Bernard B. Milmo, deceased partner of said copartnership, as co-owner with said plaintiffs of said common or partnership property.

The proportionate shares of each of said partners or co-owners is as follows, viz.:

Bernard B. Milmo, tutor, ten-eighteenths.

Mattie J. Stokoe, represented by her husband and by her two children, five-eighteenths.

Henry Hewes, three-eighteenths.

The allegation is made by the plaintiffs, and not seriously controverted by the defendant, that the lands in question can not be conveniently divided in kind, and that the partition should be made by licitation.

In limine, the defendant tendered the following peremptory exception, founded on law, namely:

That John W. Stokoe, who is alleged to be natural tutor of the minor Neil W. Stokoe, is not and never has been the tutor of said minor; that an abstract of the inventory of said minor's property, showing the amount and value thereof, has never been inscribed in the book of mortgages, as the law requires; that if any appointment of said Stokoe as tutor of said minor has been made, same is absolutely null and void and without effect of any kind; that no letters of tutorship have issued to him as tutor, and that he is without appointment as such, or authority of any kind to represent the minor as such, and more particularly without authority to represent said

minor in this suit or to stand in judgment therein; hence, the said minor is without a representative in this suit, and consequently same should be dismissed.

The issues raised herein are precisely similar to those presented and this day decided in suit of same title and bearing docket No. 1435, appealed from the parish of Iberia, and wherein the aforesaid exception was made and sustained for reasons assigned therein, and which are reiterated and adopted as our reasons for judgment in this case.

It is therefore ordered, adjudged and decreed that the judgment appealed from be annulled and reversed, and it is further ordered and decreed that this cause be remanded to the court below and therein reinstated, without prejudice to the rights of any one of the parties, either plaintiff or defendant, and with leave granted to all parties to so reform and perfect their pleadings and proceedings as to conform to the law and the views herein expressed, and as expressed in the case No. 1435 herein specified, the costs of appeal to be taxed against the appellee, and those of the lower court to await final action therein.

Mr. Justice Breaux recuses himself and takes no part in this decision.

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45 1062
110 470
110 996

No. 1432.

JAMES P. WELCH, CURATOR AD HOC, VS. JOHN P. BAXTER, TUTOR.

In directing proceedings against the tutor for his removal from the tutorship, the under-tutor is the proper person to commence the action. The judge, on information furnished him as to the necessity of the tutor's removal, can only appoint a curator *ad hoc* when there is no under-tutor.

When it is brought to the judge's attention that the funds of the minor have been sent beyond the State, he should at once direct the under-tutor to take necessary steps to protect the interest of the minor.

APPEAL from the Nineteenth District Court, Parish of Iberia. *Voorhies, J.*

Foster & Broussard and *L. T. Dulany* for Plaintiff and Appellant.

Philip H. Mentz and *Walter J. Burke* for Defendant and Appellee.

The opinion of the court was delivered by

McENERY, J. Bernard P. Milmo died in 1891, in the parish of Iberia. He left several minor children. John P. Baxter, under his will, was appointed tutor. The Rev. Father Bordy was appointed under-tutor. The plaintiff, James P. Welch, the uncle of the minors, filed a petition in the District Court, setting forth many reasons why the tutor should be removed, alleging that the under tutor, although requested to do so by him, refused to bring a suit for the removal of the tutor, and prayed that a curator *ad hoc* be appointed to bring the suit for the removal of the tutor. The plaintiff was appointed curator *ad hoc* and brought this suit.

The defendant tutor filed an exception to the action, alleging, first, "that there is an under-tutor to the minors, named in plaintiff's petition, and so long as there is such an under-tutor, he is the only person authorized under the law to bring such an action against the defendant. Second, that the under-tutor has never been ordered or directed in any manner by this honorable court to bring this suit. Third, that no one, not even a private person, has ever requested the said under-tutor to bring this suit and that the said under-tutor has never declined to bring this suit. Fourth, that none of the facts set out in the petition of the plaintiff, asking for his appointment as curator *ad hoc* for authority to bring this suit, have ever been brought to the knowledge of the under-tutor."

The under-tutor intervened, alleging what is contained in the above exception, averring also that he is at all times ready and willing to perform his duties as under-tutor to the said minors and to obey all orders that the District Court may see fit to issue to him in the proper discharge of his duties; that he has been illegally displaced by the appointment of a curator *ad hoc* without a hearing, and on an *ex parte* order of the court. He denies the averments in the petition of plaintiff and prays for a dismissal of the suit.

Plaintiff excepted to the petition of intervention on the ground that the intervenor had no interest in the suit.

Testimony was had on the exception, and it appears that the plaintiff spoke to the under-tutor about the facts alleged in his petition, but the under-tutor was satisfied with the tutor's administration and affirmed that the funds of the minors were safely and securely deposited. No order of court had been rendered requiring him to proceed against the tutor.

The exception of defendant was maintained and the suit dismissed. The plaintiff appealed.

The only question presented is whether or not the judge had the authority to appoint a curator *ad hoc* to proceed against the tutor, when there was an under-tutor duly appointed.

The under-tutor must in all cases act for the minor, when the tutor's and the minor's interest conflict. C. C., Art. 275.

Therefore, in the old code it was provided, when the judge was made acquainted with facts which required the intervention of the under-tutor, that he should direct him, or if there should not be an under-tutor, a curator *ad hoc*, or curator *ad lites* to proceed contradictorily with the tutor. The curator *ad hoc* could only be appointed in the absence of an under-tutor, or subrogated tutor, as he was designated in the old code.

In 1830 the Legislature abolished the curator *ad bona* and *ad litem* and in all cases placed the estates of minors under tutors and *under*-tutors until the minors should attain majority or be emancipated.

The curator *ad hoc* was then the only person under our system who could be appointed to represent a minor unrepresented by an under-tutor. In McGuire, Curator, vs. Ross, Tutrix, 12 L. 577, this court said: "The Code of Practice provides that the judge when made acquainted with the facts, rendering it proper to remove a tutor, if he thinks there is probable cause for removal, shall direct the under tutor to prosecute his removal; or if the minor has no under-tutor, he shall then appoint a curator *ad hoc* to represent him."

This case was decided after the abolishment of the curators *ad bona* and *ad litem*. The counsel for plaintiff contend with force and ability that the opinion in this case was predicated upon the article of the code which would read, after the passage of said act of 1830, that the judge could only appoint a curator *ad hoc* when there was no under-tutor, and that in the revision of the code in 1870 it contains no such mandatory provision as was contained in the code prior to its revision.

The article of the code as it now reads as revised is as follows: "The judge when made acquainted with such fact, if he thinks there is probable cause for removal, shall direct the under-tutor of the minor, or he shall appoint a curator *ad hoc* to commence the action." The only change in the article, and that under which the decree in case of McGuire, Curator, vs. Ross, Tutrix, was rendered, is the

omission of the words: "if said minor has no subrogated tutor." This omission, we think, can make no difference in the interpretation of the article—as they were in the original article mere surplusage. In both articles it is provided that he shall direct the under-tutor to bring the action in the first instance. In the article in the Revised Code of Practice it is evident that the judge is not at liberty to ignore the appointment of the under-tutor, since he can only be removed by a direct action in the same manner in which the tutor is removed. Code Practice, Art. 1017; see Hawkins, 35 An. 591.

The facts alleged in the petition of plaintiff are sufficient to authorize the judge to direct an action against the tutor, to the extent at least of compelling him to file an account and to show what disposition has been made of the minors' property.

It appears from the record that a part of the minors' estate is represented by promissory notes drawing interest, and that they are on, from what the under-tutor says, safe deposit in the State of Wisconsin.

The tutor has no right to send the minors' property beyond the State, except for the collection of money due on obligations. He has no right or authority to invest these funds beyond the limits of the State, and out of the jurisdiction of the court having jurisdiction of the tutorship. This fact alone, stated in the testimony of the under-tutor, requires prompt investigation. The under-tutor should be directed at once to institute against the tutor the proper proceedings to insure the safety of the minors' estate.

Judgment affirmed.

45 1065
46 1230
45 1065
47 128
47 131

No. 1436.

J. P. BAXTER, TESTAMENTARY EXECUTOR, VS. H. B. HEWES ET AL. F. W. BAUMAN, LIQUIDATOR, INTERVENOR.

1. In fixing the *quantum meruit* of the services of a liquidator of a partnership appointed by the court, the judgment of the lower court is entitled to great weight, and will not be disturbed unless manifestly erroneous.
2. The fees of attorneys employed to file and homologate the liquidator's account are a proper charge against the estate, and do not lose that character because they are partially devoted to maintaining the liquidator's charge for his services, which forms a proper element of his accounting.

APPEAL from the Nineteenth District Court, Parish of Iberia. *Voorhies, J.*

Philip H. Mentz and *Walter J. Burke* for Plaintiff and Appellee.

Weeks & Weeks contra.

The opinion of the court was delivered by

FENNER, J. Intervenor, F. W. Bauman, was appointed liquidator of the partnership of Milmo, Stokoe & Co., a firm engaged in the lumber and lumber-milling business, with powers limited to the care and custody of the partnership property and to the collection of its debts. The property was valuable, consisting of saw-mill, planing and shingle mills, lumber on the yard, swamp land, logs cut and ready for rafting, a steamboat, mules, carts, etc., besides accounts and bills receivable. The liquidator furnished a bond of $10,000. He served for about one year. During that time he collected about $7000 of the debts, and also about $4000 for lumber sold by him with the consent of the parties interested. His other duties were confined to the care and superintendence of the property, the operation of the business being entirely suspended. His duties were responsible and no doubt occupied most of his time and attention. He filed an account which was accepted and approved without opposition, except as to two items, viz.: (1) His compensation as liquidator; (2) his charge for fees of his attorneys who filed his account.

As to his own compensation witnesses were examined by both parties who gave various estimates as to the *quantum meruit* of his services, varying from $1200 or $1500 to $3500, which was claimed. The judge *a quo* fixed the amount at $2000, from which the liquidator appeals. We have read and weighed the testimony and find in it nothing which would justify us in disturbing the judge's finding, which, on such a matter, is entitled to great weight and is not to be interfered with except for manifest error.

We think, however, the judge erred in rejecting entirely the claim for attorneys' fees.

It appears that all the legal advice and services required by the liquidator up to the moment of filing his account had been rendered without charge by the counsel of plaintiff in the suit. At that time the plaintiff's counsel, considering that the liquidator's account must include his fees for services and would thus involve a conflict of in-

terest between the liquidator and their client, advised the liquidator "to procure the services of an attorney to represent him in filing his account and incidentally in collecting his fees as liquidator." Accordingly the liquidator employed Messrs. Weeks & Weeks for that purpose. The account was already made up, and Messrs. Weeks & Weeks had nothing to do but to file it and to claim in his behalf the fees for his own and for his attorney's services. There was no litigation over the account except as to these two items.

The judge, in his opinion, admits that the liquidator had the right "to employ counsel to assist him in filing his account and in having the same homologated" and that "the fees of attorneys incurred for such purpose constitute a legal charge against the assets of the estate;" but he adds, "when the liquidator employs counsel merely to protect his own individual interest, as in this case, the court is of opinion that it is neither just nor equitable that the estate should be made responsible."

Now in this case it is admitted that these attorneys were employed to file the account and to have it homologated, and that they actually performed these services. This alone is sufficient to establish his right to claim a fair fee for his attorneys. The fees of the liquidator form a necessary element of his account, and we think the professional services rendered in defending this item of the account were fairly chargeable to the estate, especially in a case like the present where the trial had and evidence taken were essential to furnish the judge a basis for intelligent action in fixing the amount.

Considering, however, that the attorneys had no labor in framing the account and encountered no opposition except as to these particular items and the brevity of the trial thereon, we think a fee of $100 will be a sufficient allowance.

It is therefore adjudged and decreed that the judgment appealed from be amended by reversing that portion thereof which rejects the demand for attorneys' fees, and by now allowing and fixing the same at the sum of $100, and that, as thus amended, the judgment be now affirmed, appellees to pay costs of this appeal.

45 1067
46 1112

No. 1445.

CLINTON B. ANDRUS VS. HIS CREDITORS.

The verdict of the jury in insolvency proceedings characterized the cession made as fraudulent.

The property of the insolvent did not thereby again become liable to seizure under execution or by attachment of individual creditors.

The interest of the mass of the creditors is not dependent upon the opinion of the majority in number and amount of the creditors, not legally expressed. The restraining order remains. Other proceedings must be taken and meeting of creditors held.

The surrender is made to the creditors, who have the right to sell the property for their benefit; that right can not be defeated by the fraudulent acts of the debtor.

APPEAL from the Eleventh District Court, Parish of St. Landry. *North Cullom, J.*

Thos. H. Lewis for Opponents and Appellants.

Kenneth Baillio contra.

The opinion of the court was delivered by

BREAUX, J. A number of the creditors of the insolvent allege that he has made a fraudulent surrender of his property; has given undue preference to certain creditors to influence them to vote for the acceptance of his cession and for his discharge.

That after having settled with these favored creditors, at a given percentage on the dollar, they gave him their blank powers of attorney, which he caused to be filled in the name of persons as agents whom he knew would vote as he desired.

In their opposition the creditors who are opponents charge that he withheld from his cession, in addition to the cash, a stock of goods, wares and merchandise worth at least $1500, which in anticipation of his cession he caused to be moved from his store to another place in charge of another, to be disposed of by him as if for the account of the person interposed by the insolvent.

That he ordered bills of merchandise a few days before his surrender, upon receiving which he turned the goods over to the person selected by him, who sold them for his account surreptitiously.

That persons who were not his creditors voted, and that the illegal and fraudulent votes deducted, there did not remain the requisite number to accept the cession or grant a discharge.

The opponents allege that all of the insolvency proceedings of C B. Andrus are utterly null and void because of said acts, and they

pray that the order of court accepting the cession and all the insolvency proceedings, including the meeting of creditors and the acceptance of the cession, be annulled and avoided.

The insolvent answering denies that he made a fraudulent surrender; that he gave an undue preference to any of his creditors; that he offered any inducement to any of them to influence their votes on his surrender and discharge; that he has any interest or control over the store kept by L. V. Major, or that he turned over goods to him to be sold for his account surreptitiously.

He avers that he acted in good faith in all matters of his surrender.

The case was tried by jury, who found the verdict:

"We, the jury, find C. B. Andrus guilty of fraud in his cession."

The judgment upon this verdict reads:

"It is by reason thereof, and the law and the evidence favoring same, now ordered, adjudged and decreed that the cession made by C. B. Andrus to his creditors be and the same is hereby declared fraudulent, and it is further ordered that the prayer of plaintiff to have said cession annulled *in toto* and set aside as not binding on said Andrus be and the same is refused, reserving to said plaintiff his right to try the right to such a decree in a proceeding in which all the creditors to be affected by it shall be made parties."

From the judgment the opponents have appealed, and urge before this court the rescinding of the provisional order of the judge accepting the cession and the staying of the proceedings against the property of Andrus, and that all proceedings be quashed and annulled.

We will not review with particularity the evidence upon which the jury acted, for it is manifest their verdict is correct.

We do not understand that any attempt is made to reverse the finding of the jury. If there was any attempt made in that direction it would not be of any avail, for the testimony sustains the verdict as to the fraudulent character of the cession.

The acceptance of the cession by the creditors not being established by the affirmative vote of a numerical majority of the creditors having the right to vote, must fall; less than the required number of votes having been cast in favor of accepting the cession.

By this failure to accept the cession the effect of the restraining order does not cease, and the property of the insolvent does not return to the possession of the insolvent.

If such were the results, the setting aside of a cession on the

ground of fraud would have the effect of reinstating the insolvent debtor in the ownership of his property. He would gather benefits by his own fraud and misconduct.

The rights of creditors to have the property sold for their benefits would be lost to them, though a cession is a relinquishment by the debtor of his property to his creditors.

The duties of the provisional syndic as defined in the statutes are to keep as a deposit all the goods and other effects of the insolvent debtor which shall be delivered to him.

The restraining order preceding his appointment stays all the proceedings against the insolvent, who shall deliver all his goods, titles and claims mentioned in his schedule.

That order still stands; also the appointment of the provisional syndic must have effect until revoked.

In a recent decision we held:

"The plaintiffs are mistaken in the view of the situation. The very motive and object of bringing the creditors together were, through the vote taken at the meeting, to bring about a result binding on each and all, and in the supposed interest of the mass of the creditors. As said in Morgan vs. Nye, 14 An. 30, the vote of a single creditor is not a mere offer to make a new contract between the creditor and debtor, but is a *quasi* judicial act, by which the rights of other creditors are to be affected. In Anderson vs. Duson, 35 An. 917, this court of a respite said: 'The effect of the judgment is to create a judicial contract between the debtor and all his creditors, by which the debtor is allowed a delay for the payment of the sums which he owes them.'

"As the debtor's property is the common pledge of his creditors, and the contract is binding on all the creditors, the law did not and could not contemplate to confer on any one creditor the right of annulling the contract without judicial process on *the ground of its alleged* violation by the debtor and to proceed to apply the property thus restored to the possession of the debtor to the satisfaction of his individual debt." Vicksburg Liquor and Tobacco Co. vs. Jeffries, 45 An.

We have quoted freely from this decision sustaining the rights of creditors of the insolvent and laying down as correct the principle that the same rules which govern ordinary contracts should be applied and that the creditors should be afforded an opportunity to be heard and their interests consulted before any change be made.

If the rights of the creditors could not be ignored in the case from which we have quoted, they require in the case at bar that the preliminary proceedings of insolvency shall not operate to their prejudice.

In case of accusation of fraud after having received the insolvent's answer the court shall order a jury to be summoned for the purpose of deciding the accusation. R. S. 1802.

If fraud be found by the jury it does not *per se* result in rejecting the order of the judge accepting the surrender.

The agency of the court is to be applied in preventing or restraining the fraud and should not abandon on account of the fraudulent acts of the debtor all attempts at protecting the rights of creditors. The insolvent debtor is deprived of the benefit of the law passed in favor of insolvent debtors.

He is barred from discharge and other protection offered to the debtor who makes a proper cession.

The statutory denunciation of fraud is limited in its effect to the debtor. The creditor is not exposed to loss or prejudice on the discovery of fraud.

The surrender is a statutory execution. Instead of exposing the insolvent debtor to the seizure and sale of his property at the instance of individual creditors, and thereby disposing of all his property and rights among contending creditors, the statute provides an execution; that the property shall be sold and the insolvent debtor's estate settled *en concurso*.

His fraudulent acts, after the cession, affect him only. The insolvency proceedings remain for the benefit of the creditors.

"The surrender of the property is a relinquishment that a debtor makes of all his property to his creditors." C. C. 2170.

This surrender is not subject to defeat by the fraud of the insolvent.

The orders which have been issued remain and are not subject to collateral attacks.

They continue in their effect until rescinded contradictorily with all concerned. Those rights accruing to creditors by the effect of restraining orders can not be ignored.

The verdict and judgment are directed against the fraudulent acts charged, and leave the proceedings of insolvency unaffected thereby, and the property of the insolvent subject to such future actions as the creditors may see proper to take.

The judgment is responsive to the verdict. They are both directed against the fraudulent acts of the insolvent.

The action of the meeting of creditors, such as it was, is not final. Creditors having no right to vote participated. It was not a fair expression of the majority of the creditors in property and amount. Such a body, under the circumstances and the charges proved, has no authority to accept a cession or grant a discharge.

Other proceedings and at least one other meeting of creditors will have to be held in carrying out the object of the insolvency laws. Gumbel & Co. vs. Andrews, 45, and Morris McGraw vs. C. B. Andrus, Consolidated, 45 An.

Judgment affirmed at appellants' costs.

ON APPLICATION FOR A REHEARING.

The defendants and appellants in their application for a rehearing allege:

"The lower court awarded them a judgment for costs against Clinton B. Andrus personally. This court has decided that the cession made by Andrus, including the property attached in the hands of S. V. Major, vest in the mass of the creditors the right of administering and selling the insolvent's property. Andrus therefore has no property exigible for these costs, and if he had, this court has decided that it must go into the mass of his insolvent succession, and that these individual creditors have no recourse whatever upon any property that he might have.

"Therefore a personal judgment against Andrus for these costs is entirely nugatory and valueless. These costs should be paid by the insolvent succession and by privilege. C. C. 3195 and 3727 give a privilege for the payment of these claims."

There was no issue about costs at any time prior.

They follow the judgment in condemning C. B. Andrus to pay costs.

In the lower court, and in this court, it unavoidably follows that he is condemned to pay the costs as an insolvent debtor; that they must be carried on the account of the syndic as an indebtedness of C. B. Andrus, insolvent debtor, to be paid out of the proceeds of the insolvent's estate.

Having made a surrender of this property, the costs of suits decided against him since the surrender in matter growing out of, and

intimately connected with, his surrender of his property must be paid out of the insolvent's estate.

Such is the intention of our decision; its terms leave no other possible reasonable inference.

This was also in effect, in so far as relates to costs, the lower court's judgment.

These costs are secured as to their payment by such privilege as the law accords.

There is no issue presented as to that privilege.

We will not grant a rehearing to allow that which the terms of our decision secures.

The judgment on appeal is one of interpretation. It does not amend the judgment of the District Court.

In St. Louis National Bank vs. Joseph Block, 44 An. 893, we interpreted the judgment of the lower court and subjected the judgment "to the limitations stated in this opinion."

In that decision, not only interpreting but limiting the judgment of the court in certain respects, the appellant was condemned to pay costs.

In the decision in the case at bar the court's action is limited to interpreting the judgment.

It follows that the appellant owes the costs.

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45 1073
45 1072
45 1084
45 1073
46 1112

No. 1451.

MORRIS MCGRAW VS. C. B. ANDRUS.

ZUBERBIER & BEHAN VS. C. B. ANDRUS.

WACKERBARTH, JOSEPH & CO. VS. C. B. ANDRUS.

L. OPPENHEIMER & CO. VS. C. B. ANDRUS.

SCHARFF BROS. VS. C. B. ANDRUS.

CONSOLIDATED.

The creditors of an insolvent who has made a cession, which has been accepted, are vested with full power to administer and sell the property of the insolvent for the benefit of all the creditors. Their dominion over the property is supreme, and as all the property of the insolvent debtor, whether on the schedule or not, passes from the debtor, subject only to reinvestment in him on paying the amount of his debts with the expenses attending the cession, they have the same power over that concealed and left off the schedule. The resident creditor, whether participating in the insolvent proceedings or not, is

bound by the surrender and acceptance, and it may be stated as a general rule that no individual creditor can take any action in relation to the property surrendered to give him an advantage over the others. Whatever concealed property he may be instrumental in recovering inures to the benefit of all the creditors.

Where the insolvent has been found guilty of fraud, the effect of the conviction operates upon his person, depriving him of the benefits of the insolvent laws and subjecting him to punishment. It does not reinvest the property surrendered in the insolvent debtor.

Notwithstanding the order staying proceedings the creditors retain the privilege of protecting themselves in proper cases, not only by the arrest of their debtor but also for the seizure of his property not surrendered for the benefit of all the creditors.

Property recovered in an action *en déclaration de simulation* inures to the benefit of all creditors and all persons interested, as the property had never ceased to be the property of the debtor.

The estate of the insolvent must pay all expenses for the recovery of property which inures to the benefit of all the creditors.

APPEAL from the Eleventh District Court, Parish of St. Landry. *North Cullom, Judge ad hoc.*

Thos. H. Lewis for Plaintiffs and Appellees.

Kenneth Baillio for Defendant and Appellant.

Estilette & Dupré for the Provisional Syndic, Appellant.

The opinion of the court was delivered by

McENERY, J. These suits were instituted in the month of December, 1890, against C. B. Andrus, who had on the 24th day of November, 1890, made a cession of property, obtained the usual restraining order from the judge and an order for a meeting of his creditors.

The plaintiffs in these suits made substantially the same allegations and obtained writs of attachments upon a stock of goods, wares and merchandise, at the time in the possession of one L. V. Major.

They allege that on the 24th day of November, 1890, said Andrus made what purports to be a cession of property; and that the same was accpted by the judge subject to the action of the creditors at a meeting to be held, as appears by the suit of Clinton B. Andrus vs.

His Creditors, No. 1474; that in said cession and in the schedule of assets annexed to his petition said Andrus did not include all his property, and especially a lot of goods, wares and merchandise valued at $2000, and which previous to his surrender and in anticipation of it he, the said Andrus, moved out of his store into a storehouse situated in another part of the town of Opelousas and placed in the possession of said L. V. Major, the simulated and pretended owner, but really the clerk and agent of said Andrus; and that said Major was selling and disposing of said goods for the use and benefit of said Andrus; that said Andrus had also concealed from his creditors a large amount of cash; and that in withholding said goods and cash from his schedule he did so knowingly and with the intent to place the same beyond the reach of his creditors, and to defraud them; that a short time before the cession he ordered goods from merchants on ninety days' credit, which goods were shipped to him and concealed and withheld from his cession and put on sale for his account, use and benefit, by the said L. V. Major; that Morris McGraw, one of the plaintiffs, on the 18th of November, 1890, through his agent, sold a bill of goods to said Andrus on ninety days' credit, and which on being shipped to him on the 20th and delivered on the 22d of November were immediately turned over to L. V. Major; that a short time before Andrus made his surrender, and after he had placed said stock of goods in possession of Major, he ordered from Scharff Bros., of St. Louis, a delivery wagon and harness and six barrels of apples, which he directed to be shipped direct to L. V. Major, the apples to go into his stock and the delivery wagon to aid the said Major the more effectually to carry on the business which he was carrying on for said Andrus; and that in order to conceal the fact that said delivery wagon was to be used really in his service and for his benefit, said Andrus ordered Scharff Bros. to have L. V. Major's name painted on the wagon and shipped direct to the latter; that said Andrus fraudulently omitted said delivery wagon and harness from his assets, but placed Scharff Bros. on his bilan as ordinary creditors; that according to the schedule his total assets are $16,094.30 and his debts amount to $27,176.22; that the inventory taken of the property shows assets amounting to $17,175.22, and his privilege and mortgage debt amounts to $17,154.15, by which showing next to nothing will be realized with which to pay the ordinary creditors; that the concealment and diversion of his property and

fraudulent cession made by the defendant, Andrus, is injurious to them and other creditors, as it leaves substantially nothing with which to meet their claims if said cession be legalized and definitely accepted; that the order, of court accepting the cession was granted in error, and said order as well as all the other insolvency proceedings taken by said Andrus, should be set aside and annulled.

Tne plaintiffs prayed for citation upon Andrus and upon Dr. Vincent Boagni, provisional syndic of his estate. They pray further, that the cession of said Andrus and the order of the judge accepting the same be set aside and annulled, and that their attachments upon the stock of goods in possession of said Major, the delivery wagon, harness, etc., be maintained and the property sold to satisfy their debts.

C. B. Andrus filed an answer, denying all the charges of fraud, setting up that the charges are false, libellous, and that he has suffered damages to the amount of $5000, which he claims in reconvention.

The provisional syndic, Dr. Vincent Boagni, did not file any formal answer, but some time after the attachments were levied, and in answer to a rule taken by the plaintiffs to show cause why the goods should be sold as perishable property and the proceeds to remain in the sheriff's hands, subject to the determination of the suit, he opposed the rule and asked that the property be delivered to him as provisional syndic "in case the same belongs to the insolvent."

L. V. Major intervened in the suits, claiming to be the *bona fide* owner of the property attached. He also made a large claim for damages.

The plaintiffs then moved to strike from Major's intervention his prayer for damages against him, upon the ground that the District Court of this parish was without jurisdiction in the premises, they being non-residents. The court sustained the motion and struck out the claim for damages.

The plaintiffs then answered the intervenor's petition; charging that his claim of ownership was a fraudulent simulation; but if not a simulation pure and simple, then in that event that the property was acquired fraudulently, and they prayed in that event and in the alternative that his title be annulled and the property be imputed to their debt.

These five consolidated suits were tried together, and having been submitted to a jury the following verdict was rendered:

"Verdict for plaintiffs, rejecting the claims of L. V. Major, intervenor, for the goods claimed by him, sustaining the writs of attachment at cost of defendant."

The lower court thereupon gave judgment to each of the plaintiffs for the amounts claimed by them respectively; rejected and disallowed the intervenor's claim of ownership to the property attached, and maintained and perpetuated the attachments.

The questions to be considered are whether individual creditors may attach the insolvent debtor where it is alleged and shown that he is using the staying order of the judge as a shield while he is fraudulently disposing of his property, and if so what is the effect of the suit instituted by the creditor, whether the property not placed on the schedule, and seized by him under a conservatory writ, and secured under an action *en déclaration de simulation* inures to the benefit of the individual creditor or to all the creditors.

The cession or surrender of property is the relinquishment that a debtor makes of all his property to his creditors when he finds himself unable to pay his debts. C. C. 2170.

When the cession is made and accepted by the creditors, the property passes from the debtor, subject only to reinvestment in him before they have sold it, by a payment by him of the amount of his debts, with the expenses attending the cession. It is only on this condition that he can regain possession of the property. It is in a situation similar to property seized under a *fi. fa.* The debtor's possession and control over the property ceases, and can only be recovered by paying the debt and costs. He is an utter stranger to the property until he redeems it by paying the debt. Civil Code, 2178; R. S., Sec. 1791.

The creditors are vested with full power to administer and sell the property surrendered for the benefit of all the creditors. Their dominion over this property is supreme, and as all the property of the debtor, whether on the schedule or not, passes by the cession and acceptance, they have the same power of control in that concealed and left off the schedule by the debtor. The resident creditor, whether participating in the insolvent proceedings or not, is bound by the surrender and acceptance, and it may be stated as a general rule that no individual creditor can

take any action in relation to the property surrendered to give him an advantage over the other creditors. Whatever property he may be instrumental in recovering that belonged to the debtor and passed with the cession inures to the benefit of all the creditors. Vicksburg Liquor and Tobacco Co. vs. Jeffries; Anderson vs. Duson, 35 An. 917.

We think it is amply supported by authority that the creditors, particularly when no syndic has been elected, have the undoubted right to sue for and recover property which the debtor has fraudulently concealed. The debtor had never parted with the ownership of the property, and title was still vested in him until he made the surrender, when it passed to the creditors. The recovery of the property by judicial process can not therefore give an individual creditor any claim upon it superior to the other creditors. He would recover only that which was vested in all the creditors, himself included. His act would therefore necessarily inure to the benefit of all the creditors.

But the plaintiffs contend that the debtor had been convicted of fraud and that *ipso facto* the order accepting the cession and the acceptance of it by the creditors was annulled and the debtor's property was reinvested in him, and the creditors had the right to pursue it individually.

There is only one condition, as stated, that the debtor can get possession of the property, and that is that he pays the amount of his debts. Civil Code, 2178.

The law never intended that on conviction of fraud that he should regain possession of his property. It would be conferring a benefit upon him. As in this case, the property may have been sold and the proceeds in the hands of the syndic. What prevents him, before judicial process can be leveled at him, receiving this amount from the syndic and placing it beyond the pursuit of his creditors? The benefits conferred upon the honest and unfortunate debtor by the insolvent laws are discharge from his debts and immunity from judicial pursuit of his person and property. The conviction of fraud can only operate upon his person, depriving him of these privileges and subjecting him to imprisonment.

In case of Williams vs. Judge, 42 An. 71, it was held that the court having jurisdiction of the insolvency, and having granted a respite, did not strip itself of jurisdiction over a suit to annul the

order by creditors, accompanied by a prayer for conservatory process, which in that case was the service of an attachment. In the opinion this court said: "It is right and proper, particularly in cases of respite, that creditors, notwithstanding the order staying proceedings, should retain the privilege of protecting themselves in proper cases, not only by the arrest of their debtor, but also for the seizure of his property for their common benefit."

In the case of Mitchel vs. Dalton, 44 An. 825, a single creditor on his individual claim attempted to secure by attachment proceedings, commenced before the cession of property, a privilege on the property of the debtor, which was surrendered for his exclusive benefit, and ignored the insolvent proceedings. The dismissal of the suit and the dissolution of the attachment followed this irregular and unwarranted proceeding. We adhere to the doctrine in that case. But in this case the attachment was levied on property not on the schedule, but which was found by the plaintiff creditors, and seized for their individual benefit. The insolvent proceedings are not ignored, but are made the basis of the suit. The irregularities therein, in withholding this property from the schedule, is one of the grounds for the suit. Although conducted separately by the creditors for their individual benefit, the proceedings may be consolidated with the insolvent proceedings for the benefit of all the creditors. Through the intervention of the provisional syndic the creditors have made themselves parties to the suit, and they are entitled to its benefits for the simple reason that creditors can not pursue the property of the insolvent for their individual use. Anderson vs. Duson, 35 An. 917; Hayden vs. Yale et al., 45 An.

The plaintiffs assimilate their suits to the revocatory action, and as plaintiffs in said action are entitled to the benefit of the property recovered and that it should be applied to their debt. But this action is one to obtain property which it is alleged never passed from the debtor. It is a part of the insolvent's estate. There was no contract by which the property was transferred.

When the contract is serious, though fraudulent, the decree avoids it only as to the complaining creditor, and subjects it to the payment of his debt. Dunn vs. Woodward, 11 An. 267; Adams & Co. vs. Coons et als., 37 An. 305.

In the last case referred to above, which is the latest on this subject, this court said:

"It is claimed that plaintiff can take no benefit from the judgment in the case of Friedlander vs. Brooks, annulling the pretended title of Mrs. Coons and declaring 'Killikroskie' to be the property of Tempel S. Coons, but said judgment only availed Friedlander and entitled him to be paid by preference. If the action had been merely revocatory such could have been the law, but being purely an action *en déclaration de simulation* it is well settled that the effect of the judgment was to unmask the title in favor of all creditors and all persons interested, and to declare that the property had never ceased to be the property of the debtor." Authorities cited in case Lucus vs. Darmand, 11 An. 168; Dunn vs. Woodward, 11 An. 265; 1 Larombiere, Theory of Obligations, p. 776.

The provisional syndic has not aided in unmasking the fraudulent concealment of the debtor's property. This has been accomplished by the plaintiff creditors, who have devoted time, money and labor to reach this property. The mass of creditors receive the benefits. They must pay for all costs and expenses, including attorneys' fees.

It is therefore ordered, adjudged and decreed that the judgments appealed from in each of the cases of Morris McGraw, Zuberbier & Behan, Wackerbarth, Joseph & Co., Oppenheimer & Co., Scharff Bros. vs. C. B. Andrus, be reversed so far as it decrees that the proceeds of the property attached be applied to the claim of the plaintiffs; and it is now ordered that said funds or proceeds of said property be turned over to the provisional syndic of the insolvent estate of C. B. Andrus, subject to the rights and claims of all the creditors therein. In all other respects the said judgments are affirmed.

It is further ordered that the insolvent's estate pay all costs, including attorneys' fees.

ON APPLICATION FOR REHEARING.

Both appellants and appellees have filed applications for a rehearing in the above cases.

In relation to the application of appellee we will leave the amount of attorneys' fees to be fixed in the insolvent proceedings. We are not in the possession of sufficient facts to definitely ascertain the amount. The costs and privilege will of course be fixed as now established by law.

The provisional syndic asks for an amendment of the judgment releasing the insolvent debtor from paying costs of appeal.

Without granting a rehearing we will amend the judgment in this respect.

It is therefore ordered that the decree heretofore rendered be amended so as to assess the costs of appeal to the appellees. In all other respects it will remain undisturbed.

Rehearing refused.

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No. 1452.

S. GUMBEL & Co. vs. C. B. ANDRUS ET AL.

An attachment by an individual creditor for his own benefit will not be maintained pending a cession.

After the property of an insolvent has been sold it can not be seized by an individual creditor by attachment, who alleges that the insolvent has been convicted of fraud, and that his property is situated as though no surrender had ever been made.

The conviction of the insolvent debtor of fraud does not have the effect of annulling the cession accepted by the creditors. The effect of the conviction operates only on the debtor, depriving him of the benefits of the insolvent laws and subjecting him to the penalty of imprisonment.

APPEAL from the Eleventh District Court, Parish of St. Landry. *North Cullom, J.*

Thomas H. Lewis and *Lazarus, Moore & Lemle* for Plaintiffs and Appellants.

Kenneth Baillio for Defendants and Appellees.

Estilette & Dupré and *C. F. Garland* for Intervenors and Appellees.

The opinion of the court was delivered by

MCENERY, J. On the 25th day of November, 1890, the defendant C. B. Andrus filed a petition to obtain the benefit of the insolvent laws.

On this petition and a sworn statement of his assets and liabilities, and a list of his creditors, the district judge accepted the cession for the creditors and fixed a day for the meeting of creditors, and issued the usual order for a stay of proceedings against the person and property of the insolvent.

On the application of several creditors a provisional syndic was appointed, who qualified.

In compliance with the order of court a meeting of creditors was held, the cession accepted by a majority in number and amount of said creditors, who voted to accept the cession and to grant the debtor a discharge.

Oppositions were filed by several creditors charging the insolvent with fraud. At the December term of the District Court, in 1892, this opposition was tried, and a jury returned a verdict finding the insolvent Andrus guilty of fraud in his cession proceedings. On this verdict of the jury the district judge rendered judgment declaring said cession fraudulent, but declined to annul the cession in its entirety. The judgment was signed on December 27, 1892.

The plaintiff creditor filed this suit, accompanied by attachment, on November 16, 1892. The ground for attachment was that the defendant had mortgaged, assigned and disposed of his property, rights or credits or some parts thereof with the intent to defraud his creditors or to give an unfair preference to some of them, and that he had converted his property into money, or evidences of debt, with intent to place the same beyond the reach of his creditors. The funds of the insolvent estate in the hands of the provisional syndic were seized under the writs of attachment, as a third party, having under his control or in his possession rights and credits belonging to the insolvent debtor.

Several privileged creditors intervened in the suit. The defendant and these intervenors filed an exception to dismiss the suit on the ground of no cause of action.

The provisional syndic was made a party to the suit and filed the same exception.

The exception was maintained. The district judge was recused, and the judge *ad hoc* who tried the case rendered an able and exhaustive opinion for his ruling.

The suit was filed after the verdict of the jury, but one month prior to its being signed by the judge. The verdict standing by itself was inoperative. It had to be merged into a judgment to become effective.

The insolvent debtor had the undoubted right to file a motion for a new trial. Until the judgment became definitive the staying order remained in force. This case comes directly within the rule laid

down in Mitchel vs. Dalton, 44 An., where the grounds for the attachment were the same as the instant case. We said in that case: "The allegations of the plaintiff in his petition, that the defendants were insolvent and that they had defrauded, or were about to defraud, their creditors, made at the time, under the circumstances, in manner and for the purposes as they were, did not warrant the course pursued in the matter by the plaintiff." In that case, as in this, the plaintiff pursued the insolvent in disregard of the staying order, and attempted to subject property on the schedule of the insolvent to his individual debt.

The suit of the plaintiff being in violation of the preliminary restraining order granted in the insolvent proceedings is irregular and void, being directly in the face of a prohibitory law.

The suit of the plaintiff is also based on the idea that a conviction of the insolvent for fraud in the insolvent proceedings annuls all the insolvent proceedings, restores the property to him, which can be seized by individual creditors as though no surrender had ever been made.

We are unable to find any law to sustain the views presented by plaintiff.

When the debtor surrenders his property he relinquishes it in favor of all his creditors. C. C. 2170.

He has no control over it whatever. He has nothing to say about its administration or disposition. He has only the right to redeem it by paying the amount of his debts, and a residuary interest in case, after its sale, there should be something remaining.

The provision of Act 2175, which says that the surrender does not give the property to the creditors; it only gives them the right of selling it for their benefit and receiving the income of it until sold—means only that the debtor has a contingent interest in it only on paying the debts and taking the property back, and receiving the residuum after its administration by the creditors.

The insolvent law in consideratiou of an honest surrender of property grants to a debtor a discharge of his debts, freedom of his person and property from judicial pursuit. If convicted of fraud these privileges are denied him and punishment by imprisonment is also visited upon him. The conviction can in no way affect the property. To deprive the creditors of the right they have acquired on it by the conviction of the insolvent debtor would in effect be to punish the creditor.

When the surrender is made all the debtor's property passes into the insolvency, whether on the schedule or not. It is all pledged to the creditors for their common benefit. They accept the surrender with this understanding, and no act of the debtor can divest their qualified ownership of the property, except a repurchase of the property by payment of the debts.

The death of the debtor does not change the qualified ownership of the surrendered property. If he dies before the sale his succession retains the same right to redeem and to the surplus that the debtor had, but the creditors retain and hold the property in the same manner as they did before the death of the debtor. C. C. 2180.

We have not the authorities before us, but we confidently assert that in the administration of the United States bankrupt law a single instance can not be found where the insolvent was convicted of fraud and his estate was taken from the jurisdiction of the bankrupt court. It always continued in the hands of the assignee for final distribution among creditors.

The plaintiffs are attempting to seize the funds in the hands of the syndic, which is the common fund of all the creditors, and subject it to their individual benefit.

As we have stated in the case of Morris McGraw et als. vs. Andrus, the effect of such a proceeding, if the circumstances justified it, would be to bring the property if not on the schedule into the insolvency for the common benefit of all the creditors.

The property of the insolvent has been sold and the proceeds are in the hands of the syndic. There is no property, on the theory of plaintiff, in existence that can revert to the insolvent debtor. The surplus only could be demanded. But the fund belongs to all the creditors, and it must be administered for their common benefit. After the property has been sold the debtor's right to redeem it has passed. Under the facts of this case, conceding that the verdict restored the property to the debtor, what would go to him? Only the surplus after paying all his debts. No surplus is alleged in the petition. On the contrary, the insolvency of the debtor and defendant is affirmed. The petition discloses no cause of action.

Judgment affirmed.

No. 1441.

M. O. BROUSSARD VS. FELIX BROUSSARD.

M. MANADE, WARRANTOR.

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121 481
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1. Whatever the secret equities between a vendor and vendee, and whatever their rights as between themselves, the former, who has placed on the public records a title valid on its face, can not urge such equities against a *bona fide* purchaser for value from the vendee, who acted on the faith of such recorded title.
2. This principle applies to married women who, in the exercise of powers conferred by law, have executed apparently valid sales of their paraphernal property.
3. The fact that the vendor has retained possession of the property sold might, in some cases, suffice to put the subsequent purchaser on his guard and impugn his good faith, but such fact loses all significance when his purchase has been made with the full knowledge and approval of the vendor and under her assurance that the vendee had the full right to dispose of the property.
4. The protection accorded by the law to married women can not be distorted into a means of defrauding innocent persons who have acted upon the faith of titles passed by them, apparently valid and fully warranted by law, and of their own representations to the same effect.

APPEAL from the Seventeenth District Court, Parish of Vermilion. *Allen, J.*

L. L. Bourges for Plaintiff and Appellant.

W. W. Edwards and *W. A. White* for Defendant and Appellee.

Estillette & Dupre for the Warrantor.

The opinion of the court was delivered by

FENNER, J. This is a petitory action wherein plaintiff claims the ownership and delivery of certain lands which, she alleges, are in the possession of the defendant as a mere trespasser.

The defendant denies plaintiff's ownership and sets up title in himself.

A statement of the admitted or indisputable facts presented by the record subjects the case to the application of clear principles of law which leave little difficulty in its decision.

It is not denied that, in 1868, plaintiff, a married woman, separated in property from her husband, acquired the property in con-

troversy with other property by valid title and held the same as her paraphernal property.

On the 1st of January, 1879, she executed an act of sale, in authentic form, of the property thus acquired, to her brother-in-law, Joseph S. Nunez, which purported to convey the property to him with full warranty and for a definite price, which, she declares in the act, was then and there paid to her, partly in cash and partly in notes. She was properly authorized and assisted by her husband, and the act was duly recorded. On June 28, 1883, Joseph S. Nunez executed an act of mortgage on a part of the property in favor of Manade & Pedaré to secure the payment of a note given for advances made and to be made during the year to J. S. Nunez, to enable him "to cultivate his sugar plantation under the superintendence and management of his brother, Demosthene Nunez," plaintiff's husband. The plaintiff, authorized by her husband, was a party to the mortgage and signed the note as solidary security.

In 1886, Manade & Pedaré, who were aliens, brought suit, *via ordinaria*, in the United States Circuit Court on this note against both J. S. Nunez and the plaintiff; both were personally cited, and, making no appearance, judgment by default was duly entered and confirmed whereby both were condemned *in solido*, and the mortgage was recognized and ordered to be enforced. On this judgment a writ of *fi. fa.* was issued in January, 1887, under which the mortgaged property was seized; notice of seizure was served on plaintiff and her husband, as well as on J. S. Nunez personally; the property was duly advertised, appraised and sold, and was adjudicated to M. Manade, one of the judgment creditors. Shortly thereafter, on July 6, 1887, Manade sold the property thus acquired to Felix Broussard, the present defendant, who received and has held possession, without objection or interference by plaintiff, up to the date of the institution of this suit.

On the same day, Joseph S. Nunez transferred to defendant the remainder of the property sued for in this action, by an act of exchange, by which defendant, in consideration for the same, transferred to Nunez a valuable plantation belonging to him. The plaintiff and her husband were both cognizant of this exchange, approved and encouraged it, and plaintiff advised defendant to make it. After the exchange plaintiff removed from the property to the plantation received from defendant, and lived upon the same until it was seized and sold in satisfaction of debts of Jos. S. Nunez.

Such are the titles propounded by defendant in opposition to the plaintiff's demand.

The present action is doubtless prompted by the judgments rendered by this court in the cases of Broussard vs. Sheriff et al., 44 An. 881, and 43 An. 939.

Those were actions brought by the present plaintiff to restrain the sale by creditors of J. S. Nunez of certain property different from that herein involved, but covered by the same sale of January 1, 1879, from plaintiff to said Nunez hereinabove referred to, and to have said sale pronounced a nullity on the ground that the sale was simulated and fraudulent, and executed under the influence of her husband, merely as a pignorative contract intended as security for his debt, in violation of a prohibitory law, and, therefore, null and void. Our judgment annulled that sale and perpetuated the injunction.

But in those cases we were dealing with simple judgment creditors of Jos. S. Nunez, who were seeking to subject to the payment of their debts property which, though apparently belonging to their debtor, did not really belong to him, but to another. They had paid no value and parted with no consideration on the faith of the apparent title. In this case we are dealing with the rights of a purchaser for value and in good faith, who acquired on the strength of the apparent title, valid on its face and with the full knowledge, approval and participation of the very party who now sets up its nullity.

In the very case above referred to (44 An. 833) we said: "It is quite true as a matter of equity, and this court has repeatedly maintained the principle, that, in case a party in possession under a recorded title executes a special mortgage thereon in favor of a third and innocent mortgagee, who advances money upon it, he nor his vendor can successfully attack and defeat it, on making proof of secret equities and latent ambiguities in the title."

It is true, it appears that J. S. Nunez did not take physical possession under the conveyance from plaintiff to him, but that fact loses all significance in view of the facts in this case. Plaintiff was herself a party to the act of mortgage from Nunez to Manade & Pedaré and a joint obligor on the note secured. She recited therein that the plantation belonged to Nunez and was only "under the administration and management of her husband." Moreover, she was

a party to the suit enforcing the judgment, and, if she had any defence thereto, she should have urged it, and, not having done so, is bound by the judgment and by the execution and sale thereunder, of which she had full notice and which she recognized by promptly and peaceably delivering possession to the adjudicatee and his vendee. The verity and full consideration of the mortgage and the perfect good faith of Manade & Pedaré, the binding effect of their judgment obtained contradictorily with plaintiff, and the validity of Manade's title as adjudicatee at a sale of which plaintiff had the fullest notice, do not and can not admit of question, and defendant's acquisition from Manade is entitled to like protection.

The same principles apply to the exchange between Nunez and defendant. Plaintiff actively participated in promoting and bringing about said exchange, and she also participated in its execution by delivering possession of the property now claimed to defendant and by actually removing to and taking possession of the property received from defendant.

A feeble attempt was made to impugn the good faith of defendant in this transaction and to bring home to him notice of the unreality of Nunez' title. This attempt is a failure. It rests exclusively on the testimony of Nunez, which is contradicted by defendant, and was not believed by the judge *a quo*. Whatever suspicion might have been aroused by the fact of plaintiff's continued possession of the property was entirely removed by plaintiff's own assurances as to Nunez' right to dispose of the property and by her voluntary participation in the execution of the exchange. We consider that defendant has fully established his position as a purchaser in good faith and for value on the faith of apparently valid recorded titles.

It is settled in this court by a jurisprudence too inveterate to admit of question that "whatever the secret equities between a vendor and vendee, the former can not claim them against a subsequent purchaser in good faith. Having placed on the public records the title on the faith of which such purchaser acquired, the vendor must bear the consequences of having presented the vendee's rights in a false aspect."

Hennen's Dig. Sale V (a), No. 1, and numerous authorities there quoted.

Plaintiff had full power and authority to make the sale to Nunez,

and, upon its face, it was as valid a title as if made by a man or *femme sole*. The doctrine above quoted has been applied to a married woman in such case, and it was held that "threats and undue influence of the husband to induce his wife to sign an act of sale of her paraphernal property to B can not affect the rights of C, a *bona fide* purchaser from B." Blanchard vs. Castile, 19 La. 362.

The equity of the doctrine is well expounded by Chief Justice Marshall in the following language:

"If a suit be brought to set aside a conveyance obtained by fraud, and the fraud be clearly proved, the conveyance will be set aside as between the parties; but the rights of third persons who are purchasers without notice, for a valuable consideration, can not be disregarded. Titles, which according to every legal test are perfect, are acquired with that confidence which is inspired by the opinion that the purchaser is safe. If there be any concealed defect arising from the conduct of those who had held the property long before he acquired it, of which he had no notice, that concealed defect can not be set up against him. He has paid his money for a title good at law; he is innocent, whatever may be the guilt of others, and equity will not subject him to the penalties attached to that guilt. All titles would be insecure, and the intercourse between man and man would be very seriously obstructed, if this principle be overturned." Fletcher vs. Peck, 6 Cranch. 133.

Married women can claim no exemption from the application of these principles when acting within the powers conferred upon them by law. The principle heretofore announced by this court fully applies:

"While the law and the jurisprudence have at all times favored married women in the assertion and vindication of their rights, they have never intended and do not contemplate to protect them in the perpetration of fraudulent practices, for the accomplishment of villainous objects, by which to enrich themselves gratuitously at the expense of their unguarded and trusting neighbor, on whom equity keeps a watchful eye." Henry vs. Gauthreaux, 32 An. 1108.

There are other principles of law equally antagonistic to plaintiff's claims in this case, but we deem the above conclusive and sufficient.

Judgment affirmed.

No. 1449.

PARISH OF ST. LANDRY VS. JOSEPH BLOCH.

1. The Constitution defines the jurisdiction of justices of the peace and confines it to action as committing magistrates, having power to bail and discharge in certain cases.
2. Justices of the peace have no jurisdiction to enforce penalties of fine and imprisonment imposed for violation of parochial ordinances by criminal proceedings inaugurated by ordinary civil process and citation.
3. An ordinance conferring such jurisdiction on justices of the peace is illegal and unconstitutional, and proceedings in exercise thereof are null and void.

APPEAL from the First Justice of the Peace, parish of St. Landry. *Brooks, J.*

E. B. Dubuisson for Appellee.

Kenneth Baillio for Appellant.

The opinion of the court was delivered by

FENNER, J. This is an appeal from a judgment rendered by a justice of the peace, condemning the defendant "to be fined in the sum of $25 and the costs of these proceedings, and in default of payment of same he be imprisoned ten days in jail." The proceeding was for a violation of an ordinance of the police jury prohibiting the propulsion by steam of traction engines over the public roads of the parish, and providing that "whoever shall violate this ordinance * * shall be deemed guilty of a misdemeanor, and upon conviction thereof before any justice of the peace shall be fined the sum of twenty-five dollars and the cost of the court, and in default of the payment of said fine and cost shall be imprisoned in the parish jail not less than five nor more than ten days."

The obvious import of this language shows that the ordinance creates and defines a criminal offence, prescribes penalties therefor, and authorizes the prosecution and conviction of offenders before a justice of the peace.

The proceeding in this case was begun by affidavit, charging defendant with violating the ordinance "contrary to the statutes of the State in such cases made and provided and against the peace and dignity of the same," and concludes, "wherefore affiant prays that

the said Bloch be arrested and dealt with according to law." The case has no feature of a civil suit. It is unquestionably a criminal prosecution, and this is evidently the proceeding contemplated and provided in the ordinance.

The plea of the illegality and unconstitutionality of the ordinance was duly made and overruled, as also a plea to the jurisdiction.

These pleas should have been sustained. The ordinance could not constitutionally confer such jurisdiction on justices of the peace. Articles 125 and 126 of the Constitution of 1879 define the jurisdiction of justices of the peace, and they have no criminal jurisdiction except as committing magistrates, with "power to bail or discharge in cases not capital or necessarily punishable at hard labor."

Whether, under Art. 3364 of the Revised Statutes, the fine imposed by the ordinance might have been recovered in an ordinary civil suit before the justice of the peace is a question not here presented. The ordinance does not contemplate such a proceeding and the case before us does not present such an one.

In two very recent cases, we held that justices of the peace had no jurisdiction to enforce penalties imposed for violation of parochial ordinances by criminal proceeding inaugurated by affidavit and arrest, but were confined to ordinary civil proceedings by citation. State ex rel. Long vs. Justice, 44 An. 949; Board of Health vs. Justice, 45 An.

In Police Jury vs. Arleans, 34 An. 646, we very distinctly held that "a person can not be arrested under a warrant issued by a justice of the peace charging him with violating an ordinance of the police jury and sentenced to fine and, in default of payment, to imprisonment by said justice," and that an ordinance authorizing such a proceeding was illegal and null and void.

Our conclusion on this point is so clear and so fully sustained by authority that we deem it unnecessary to consider any other.

It is therefore adjudged and decreed that the judgment appealed from be annulled and reversed at plaintiff's cost in both courts.

No. 1431.

D. J. REID ET AL. VS. THADEUS MAYO ET ALS.

1. A lessee, in possession of a newspaper plant and paraphernalia thereto appertaining, can not convert himself into an owner thereof without the knowledge or consent of his lessor and by the unique and simple process of changing his name and capacity from editor and publisher to editor and proprietor.

2. One purchasing such plant from the person who has thus sought to convert himself into an owner has the duty imposed upon him of scrutinizing the claims of the vendor, particularly if he has been advised of the previous existence of the relations of landlord and tenant.

8 If, in addition, the proof shows that such purchaser has been fully advised and informed by the vendor of the source of his title, and of the negotiations through which he acquired title, he can not found any equity or plead any estoppel raised on the aforesaid *apparent* change of proprietorship of the paper.

APPEAL from the Twelfth District Court, Parish of Calcasieu. *Fournet, J.*

Wm. F. Schwing for Plaintiffs and Appellants.

A. P. Pujo and *Mitchell & Mitchell* for Defendants and Appellees.

The opinion of the court was delivered by

WATKINS, J. This suit has for object the recovery of a newspaper plant styled the *Lake Charles Echo*, and the paraphernalia appertaining thereto.

It is directed against Mayo as the party in possession claiming ownership; and against R. C. Gilliland as lessee, the relief demanded being the restitution of the property and the cancellation of the lease.

The property was sequestered by the plaintiffs and bonded by Mayo —Gilliland making no defence, and no one representing him at the trial.

The defence is a general denial, coupled with an averment that Mayo purchased from R. C. Gilliland, on March 16, 1892. And, in in the answer, is incorporated a plea of estoppel, by way of exception, to the effect that plaintiffs were precluded by their laches and negligence from asserting and setting up title in themselves.

Upon these issues the cause was tried and decided against the plaintiffs—the judgment rejecting the plaintiffs' demands, dissolving the sequestration and reserving defendant's right to sue for damages.

Plaintiffs, Reid and Andrus, claim to have acquired the property in controversy in 1890, from J. W. Bryan, for a valuable consideration actually paid by Reid, though title was executed in favor of Thomas Kleinpeter, who subsequently executed title to Reid for

twenty-eight-thirtieths, and to Andrus for one-thirtieth—Kleinpeter retaining title to one-thirtieth.

That the three organized a company, or copartnership, styled *The Lake Charles Echo Publishing Company*, and in that capacity operated the plant.

That subsequently, Reid acquired the interest of Kleinpeter, and, on the 23d of June, 1891, the company leased the outfit to R. C. Gilliland for the term of one year, with the privilege of renewal for another year, at $100 per month, during the term of the lease—the lease being evidenced by a written agreement that was left in the possession of the lessee.

Petitioners declare that they are still the rightful and legal owners of the plant and property; that Gilliland has paid no part of the rent, or lease price thereof, and has violated and broken all of his engagements, and absconded, abandoning the property; and that Mayo has by some means acquired possession thereof and is claiming ownership, operating same to their detriment and injury, and is endeavoring to dispose of it against their will.

In the brief of defendants' counsel we find the following admissions of fact, viz., that James W. Bryan sold and delivered the newspaper plant in controversy to Thomas Kleinpeter for the price of $5500, of which $3250 was paid in cash, and, for the residue, notes of the purchaser were executed, maturing during the year thereafter ensuing—the sale being evidenced by a notarial act, and same being duly recorded in the conveyance records of the parish. That upon the same day (March 14, 1890) Kleinpeter conveyed to Reid and Andrus twenty-nine-thirtieths interest in the plant, as stated in the petition, and that subsequently the three parties named formed themselves into a company for the publication of the newspaper, as plaintiffs allege.

They further admit that "on June 23, 1891, plaintiffs leased to R. C. Gilliland the *Echo* (newspaper), and that Gilliland went into possession as *editor and publisher*, with his name promulgated as such on the title page of the paper until the issue of February 5, 1892;" but they aver that in the issue of the paper under date February 12, 1892, Gilliland announced himself to be *editor and proprietor*, and that this announcement remained until the time of the sale of Gilliland to Mayo, on the 18th of March, 1892—it being followed by the subsequent publication of Mayo's salutatory in the issue of the paper under date of March 18, 1892.

It is further alleged and insisted upon that during the interval that intervened between the dates of the two announcements, "Mayo remained in quiet, open and undisputed possession of said paper as owner, without molestation, until the institution of this suit on the 3d of May, 1892."

Up to this point the averments and admissions conclusively establish the plaintiffs' title, and the possession of Gilliland as lessee under plaintiffs, on the 23d of June, 1891, and continuously thereafter to the 12th of February, 1892, at least.

It just as necessarily follows that defendant's claim of title arose subsequently and must depend upon facts subsequently arisen.

Looking into the record we find the *indicia* of defendants' title to be as follows, viz.:

First—A receipt, which is couched in the following terms, namely:

"NEW ORLEANS, March 8, 1892.

"Received of R. C. Gilliland, representing J. H. Gilliland, the sum of five hundred dollars, first payment on Lake Charles *Echo* newspaper.

(Signed) "C. McD. PUCKETTE."

Second—A bill of sale from R. C. Gilliland to Thad. Mayo for the price of $2000 cash, expressing full warranty, bearing date March 16, 1892.

There is nothing to connect the title of Puckette with that of Reid, Kleinpeter & Andrus, nor is there anything pointing to the *source* of his title as being derived from any other person than the plaintiffs.

In this situation, it is manifest that the sole reliance of the defendants to cure this apparent defect is upon their plea of estoppel. In fact, counsel for defendant, Mayo, do not make any mention in their brief of his alleged title from Gilliland and Puckette, but rest their defence exclusively upon their plea of estoppel, formed upon the plaintiffs' laches and negligence in asserting their claims.

It is quite true that, in the answer, there is an averment to the effect that, from the 12th of February, 1892, Gilliland (Mayo's vendor) "was in peaceable, public and undisturbed possession of said Lake Charles *Echo*, as editor and proprietor thereof;" and further to the effect "that said Gilliland represented himself to the defendant as owner thereof, and believing such to be the case, he purchased from him in good faith," etc. Yet, in argument and brief, no stress is laid, or point made, upon the title he obtained from

Gilliland and Puckette, and without which the possession and pretensions of Gilliland are vain and nugatory.

Roundly stated, we have for consideration and solution the proposition that Gilliland, as lessee of the plaintiffs in June, 1891, and continuously thereafter, until February 12, 1892, converted himself into an *owner* of the plant and property leased, during the term of his lease and without the knowledge or consent of the lessor, and by the unique and simple process of changing the name of the responsible head of the paper from "R. C. Gilliland, editor and *publisher*" to "R. C. Gilliland, editor and *proprietor*."

That, forsooth, the plaintiffs did not observe that alteration and immediately protest against it, and failing to have this protest heeded and to have at once brought suit, they are guilty of such laches and negligence as to preclude the assertion of their rights; defendant founding his claim upon this apparent change in the proprietorship of the newspaper and the *alleged* assertion of Gilliland's ownership.

As a proposition of law the foregoing is altogether untenable, for, as a lessee of the plaintiffs, Gilliland was wholly without legal right to so alter or change his relations toward his landlords during the term of his lease, as to acquire the ownership of the thing leased, without the knowledge or consent of the lessors, and he could convey no better rights to a stranger. But Mayo confesses, and his counsel admit, that Gilliland occupied and operated the newspaper plant, as lessee of the plaintiffs, up to the 12th of February 1892, and consequently he was put upon his guard in reference to Gilliland's right to sell.

The district judge in his reasons for judgment states that inasmuch as the law pronounces the nullity of the sale of a thing that belongs to another, the court would be at once satisfied of plaintiffs' ownership if no plea had been interposed in bar of their recovery; and then states his conclusions to be that the following difficulties are in their way, viz.:

1. That prior to the institution of this suit neither of the plaintiffs had disclosed their names as owners of the paper.

2. That, construing their acts logically, they had purposely concealed any proprietary interest they had therein.

3. That they at first substituted Kleinpeter as the ostensible owner, and thereafter disguised their real ownership behind the mask of the Lake Charles Echo Publishing Company.

4. They then placed it under the control of R. C. Gilliland as editor and *manager*, and afterward the paper passed to R. C. Gilliland as editor and *proprietor*, who assumed that title at the head of the editorial columns of the paper without attracting attention, and, with respect to third persons, without objection on the part of plaintiffs.

5. That when the plaintiffs were informed that the defendant was bargaining for the purchase of the property, they maintained silence and made no protest against the accomplishment of an act in which he would have had such manifest interest if he had been owner.

His observations are thus concluded:

"Not only before the sale was effected did he fail to *warn defendant*, Mayo, and put him on his guard when he had an opportunity to do so, but that he preserved the same policy of silence after the sale to Mayo, and made no demand for the restitution of the property, and allowed the defendant to quietly take possession of the property, and for nearly two months failed to signify by word or deed that he laid any claim to the property."

As opposed to the foregoing inferences which the judge *a quo* has drawn from the evidence in substantiation of the defendants' plea of estoppel, the testimony shows that the plaintiffs had not observed the change Gilliland had made in the apparent proprietorship of the paper, and that same had been made without his knowledge or concurrence; yet Mayo was informed of the fact on the very day same occurred. It further shows that just as soon as Reid was advised of Gilliland's contemplated sale of the plant, he interviewed him on the subject, and he disavowed any such intention in the strongest possible language.

Assuming this statement to be true, what was the necessity for Reid to have taken the additional precaution of forewarning Mayo, when no sale was contemplated by Gilliland. Conceding it to have been a fact that Mayo was advised of the ostensible change in the proprietorship of the paper, was it not his duty to have mentioned to Reid his contemplated purchase from the person whom he knew to have been his tenant? And if Reid acted improperly in not disclosing his ownership, did not Mayo act just as imprudently in not making proper inquiry into Reid's claim of ownership?

These questions must receive an affirmative answer. But there are other facts that must be taken into account, also, in determining the efficacy of the defendant's plea of estoppel.

In the first place, Bryan sold the newspaper plant to Kleinpeter in 1890, and executed a notarial act of transfer, and caused same to be recorded in the conveyance office; and Mayo, being clerk of court at the time, was aware of that fact, confessedly.

More than a year previous to his purchase of Gilliland, Mayo was informed that Kleinpeter had sold the paper, and was likewise advised that the plaintiffs were the persons composing the Lake Charles Echo Publishing Company.

As a witness Mayo states that seeing the name of Gilliland at the head of the paper was the first direct information that he had that he was owner of the paper. But this question is not open to inference, as the judge *a quo* submits, for the plain reason that the testimony of the defendant is full upon the subject. He makes the statement that he asked Gilliland "if the paper belonged to him, and he answered that his father, J. H. Gilliland, was negotiating to purchase the paper, and as soon as the trade was made he would let him know, and that he was expecting his father every day; that his father came a short time afterward, and R. C. Gilliland came to him and asked him to go around and see his father at the Howard House, his father having come in late the night before and wanted to get off to New Orleans on the 11 A. M. train; that he went with him and met his father, J. H. Gilliland, who informed him that he was then on his way to New Orleans to close his trade for the Lake Charles *Echo, and that if he made the trade he would let R. C. Gilliland his son, know*, and any trade he (Mayo) might make with his son would be all right. Several days afterward, R. C. Gilliland informed him that the trade was made, and he (R. C. Gilliland) announced his name as *editor and proprietor. That he then commenced negotiating with R. C. Gilliland for the paper*, which was finally consummated on the 16th of March, 1892."

This testimony clearly indicates that instead of Mayo having been deceived by appearances in regard to Gilliland's apparent show of ownership, and the silence and inaction of the plaintiffs, he acted with great deliberation, and was fully advised by Gilliland of all his plans, *antecedent to the change of ostensible proprietorship of the paper.*

But the Puckette receipt, under which Gilliland sets up his claim of title, discloses that he had the negotiations referred to at least *three weeks subsequent* to said change of proprietorship; and that Mayo was fully advised of these negotiations his own testimony will attest.

"Being shown document No. 2 (the Puckette receipt), says he: 'The first he saw of it was in New Orleans, on the 8th of March, 1892. It was shown to him by R. C. Gilliland. He had furnished him $600 to consummate the trade for the *Echo*. That was on Monday, the 7th of March, 1892. That he (Gilliland) went around to get a bill of sale from Puckette, as he told me, promising to meet me between 2 and 3 o'clock. He had with him a bill of sale—a notarial act which was signed by C. McD. Puckette, conveying to Gilliland the Lake Charles *Echo* newspaper, for, I think, $600 cash, and the balance on one, two and three years' time, stating that this act had been left at the notary's office for him and Gilliland to sign. That he looked at this act of sale and told him that if he purchased under that sale he had no use for the paper, and would not buy it, as it contained a vendor's lien. He (Gilliland) then left him, and said he would go back, see Puckette, and get a different kind of sale. That he saw him no more on that day, but the next day, the 8th, he met him * * * when he showed him the receipt marked No. 2, stating that he had saved $100 by holding on, but that Puckette refused to give him any other kind of a sale than the one drawn up the day before.'"

This interview occurred *nearly one month subsequent* to the alleged change of proprietorship of the paper, and fully advised Mayo that Gilliland had no title at that date, nor for three weeks afterward. It gave him the fullest and most complete knowledge that Gilliland pretended to have no claim to the paper at the time the published announcements were made that he was proprietor, and that he did not claim to have any for nearly three weeks thereafter.

Taking this evidence into consideration, there is no foundation for defendants' plea of estoppel. But the learned judge *a quo* also makes reference to the published circular that Reid issued, and in which it is said he "expressed, in a public and unequivocal manner, *more than a month after the sale and delivery of possession of the Echo to the defendant*, and declared that his opponents had bought up all the Lake Charles newspapers, and alluded to Mr. Thad. Mayo, the defendant, as present editor and proprietor of the Lake Charles *Echo*;" and other similar statements.

In the first place this evidence does not respond to defendant's plea of estoppel, which rests exclusively upon the plaintiffs' alleged *laches* and *negligence*. But, giving these recitals full force and effect, they do not go to the extent that is contended for them.

The principal recitals that are relied upon, are to the effect that Reid's political opponents had, by the lavish use of money, "bought up all the Lake Charles newspapers," and "that he had no newspaper to reply to his many attacks," etc. These statements were made with reference to the then existing campaign and the influences that had been brought to bear on his canvass, and amongst other things he evidently referred to the *editorial control* of the parish newspapers, generally, being adverse to his interest

Same are not inconsistent with the plaintiffs' ownership of the property, and is fully explained by other evidence already adverted to and considered.

A careful and painstaking examination of the transcript and a full investigation of the whole evidence has satisfied us that the plaintiffs have fully substantiated their claim of ownership, and that they should have judgment for the property in dispute.

It is therefore ordered and decreed that the judgment appealed from be annulled and reversed; and it is further ordered and decreed that the plaintiffs be decreed the owners of the newspaper plant and property in controversy, and placed in possession; that the sequestration be sustained and enforced, and that the defendants be taxed with the costs of both courts—the plaintiffs demand for the revocation of lease being dismissed as of non-suit.

ON APPLICATION FOR REHEARING.

Our attention has been, for the first time, called to the fact that the defendant, Andrus, did not perfect his appeal by signing an appeal bond, and that in respect to him no alteration can be made in the judgment appealed from, and consequently our decree should be corrected in this particular.

The motion for rehearing has been examined and considered on other grounds therein assigned, but a careful examination of the record and our opinion have satisfied us that the appellee's complaint is not well founded.

It is therefore ordered, adjudged and decreed that the judgment and decree herein rendered be so amended as to affirm the judgment appealed from in so far as the plaintiff, Andrus, is concerned, and that in all other respects same remain undisturbed—plaintiffs and appellants to be taxed with the costs of appeal.

Rehearing refused.

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No. 1443.

JOEL B. WOLFE VS. ULYSSE JOUBERT ET AL.

1. Section 2668 of the Revised Statutes of 1870 was borrowed from the New York legislation on the subject, and the courts of that State have interpreted its intent to be, to prevent the use of the name of a person not interested in the firm thus inducing a false credit to which it was not entitled, and this on the strength of a name which had been withdrawn, or in which there was no authority to use.
2. The object of the law was to prevent the *obtaining* of credit, secured by fraudulent representations, but not to prevent the *giving* of credit, and after it was given and the day of settlement had come, prevent the party infringing the statute from demanding payment of his debtor.
3. A third possessor holding title to property judicially mortgaged for his vendor's debt may collaterally attack the validity of the judgment which is the foundation of the judicial mortgage which is sought to be enforced against it and show that same is null for any cause inherent in the judgment; yet his rights, in this respect, are just the same as those of his vendor, as judgment debtor—no greater and nothing less.
4. Between the vendor and vendee there is a privity of contract which entitles the latter to *exercise* any right of the former, for his protection, notwithstanding he may have renounced or abandoned them.
5. The judicial mortgage takes effect from the day on which the judgment is recorded, with this modification by the statute of 1898, that judgments rendered at any term of the court, outside of the parish of Orleans, shall have no effect to create a judicial mortgage, *as between judgment creditors*, until from the day of the adjournment of the term at which same was rendered, although recorded prior to the adjournment of said term, the effect of that statute being to make the registry of several judgments, rendered at the same term, concurrent, and not to deprive them of any effect aga nst the *debtor* until after the adjournment of the term.

APPEAL from the Eleventh District Court, Parish of St. Landry.
Perrault, J.

Kenneth Baillio for Plaintiff and Appellee:

1. A plea of discussion in a hypothecary action is a dilatory plea and comes too late after default or answer filed. 34 An. 962.
2. A dilatory plea is waived by referring it to the merits without objection. 39 An. 624; 35 An. 284; 34 An. 966; 26 An. 312.
3. The defendant in a hypothecary action receives the full benefit of the plea of discussion if other property of the judgment debtor is sold before trial and judgment and due credit is given for same on the debt claimed by the hypothecary creditor.
4. The defendant in a hypothecary action has no right to urge defences against the judgment and mortgage which his vendor could not have set up. 35 An. 829.
5. The judicial admission and averment estops a party from subsequently contradicting them. A fact once admitted can not afterward be denied. 23 An 764; 22 An. 252.

6. The prohibition contained in R. S. 2668 and 2669 is directed against the *obtaining* and *enforcing* of credit and is in no wise prohibitory of the *giving* credit and demanding payment for said credit. 36 An. 238 and 240; 36 An. 259 to 260 and 261.
7. The principle announced in the foregoing syllabus applies particularly in a case where the creditor has reduced his claim to judgment and where that judgment has been partly executed and satisfied without objection on the part of the judgment debtor. Such silence on his part is to be viewed as a waiver and acquiescence on his part, binding on him as well as upon his vendee.

Thos. H. Lewis contra:

Section 2668, Revised Statutes, is a prohibitory law based upon public policy. It prohibits the transaction of commercial business under a false name and style. Courts will not lend their aid to enforce such transactions as against third parties who had no connection with nor profit from such transactions. It matters not if the nullity be not formally declared. C. C. 11, 12, 1893, 1895.

Section 2668, Revised Statutes, is borrowed from the New York statute, and a resident of that State selling goods to a resident of Louisiana in contravention of this law has no standing to plead exemption from its provisions. Nor will the provisions of this law be dispensed with on the ground that the particular act in question was not wicked or contrary to the public good. C. C., Art. 19.

Registry laws are artificial rules, the creatures of positive legislation. Tending as they do to multiply forms in the transmission of property, and to restrict one's natural right to do what he pleases with his own, they are not to be extended to cases not within their obvious intendment. Johnson vs. Bloodworth, 12 An 699

The judicial mortgage takes effect from the day of adjournment of the term of court at which the judgment was rendered. Act No. 143 of Acts of 1888. And a party who claims a judicial mortgage must bring himself within the terms of that statute. H. D., p. 496, No. 8; same Vol., p. 524, Nos. 1, 2, 3, 5.

He must anticipate every hypothesis naturally arising out of the nature of his demand, on which the defendant may escape liability. Lafitte vs. Perkins, 21 An. 171. And a plaintiff must allege facts material to his case even though they invoke a negative. Mothroy's Case, 13 La. 52; McRae's Case, 12 An. 85 And so, one demanding a judicial mortgage on the property of a third person must show that his judgment has been duly recorded. Cassedy's Case, 2 R. 49.

The law, C. C. 2251, devolves upon the notary the duty of depositing in the mortgage office the originals of all acts passed before him. He is permitted to retain the acts fifteen days, and negligence is not imputable to him for not depositing the acts before the expiration of that delay. If however the contrary be true, then the burden of proof of negligence within this period is upon the plaintiff claiming the judicial mortgage. Officers are presumed to do their duty, and in all cases where fault or negligence is alleged it is, says Mr. Cross in his work on Pleading, p. 119, "necessary, in order to overcome the presumption, to allege and prove the contrary proposition."

An absolute judgment ordering sale of property is erroneous. Desobray's Case, 9 An. 180.

The opinion of the court was delivered by

WATKINS, J. This is an hypothecary action brought against the two defendants, Ulysse and Homer Joubert, as third possessors

of property derived from the plaintiff's judgment debtor, Phillip Thompson, subject to his duly recorded judicial mortgage; and the prayer of his petition is that same be ordered sold to pay that judgment in due course of proceedings.

Plaintiff's averments are to the effect that on the 15th of December, 1890, he obtained a judgment against Thompson in the United States Circuit Court at New Orleans, in this State, for the sum of $3768.90, with interest, and caused same to be duly inscribed in the proper book of mortgages for the parish of St. Landry on the 20th of said month.

That said registry and inscription operated in his favor from and after that date as a judicial mortgage upon all real property then owned or since acquired by his judgment debtor in that parish. That at the date and time of said registry and inscription Thompson owned certain described property in that parish, against which he proceeds and which is in the possession of the two defendants in the proportions stated.

For the evident purpose of identification the plaintiff avers "that on the 9th of December, 1890, said Phillip Thompson sold said property to William Evans * * * but said sale was only recorded in the conveyance book of the parish on the 22d of December, 1890." He also avers "that since the purchase by said William Evans, as aforesaid, he has disposed of said property—one-half to Homer Joubert, and the remaining one-half to Ulysse Joubert"—though he avers that said sales to the Jouberts "were only recorded in the conveyance office of St. Landry parish on the 22d day of December, 1890, and said properties were and are affected by his said mortgage," etc.

After excepting, the defendants filed an answer and called their vendor, William Evans, in warranty, demanding such judgment in their favor against said warrantor as may be rendered against them; and Evans, in turn, excepted, and called in warranty his vendor, Thompson, and thereupon Thompson filed an answer pleading the general issue, and specially disavowing the existence of any recorded judgment operating a judicial mortgage on the property he conveyed to Evans at date of sale, December 9, 1890; also, that the failure of Evans to have his act of sale recorded in time relieves him from all responsibility.

On the issues thus made up the case went to judgment and was

decided in favor of the plaintiff and against the defendants, and they had like judgment against their warrantor, Evans; and he in turn had judgment against his warrantor and plaintiff's judgment debtor, Thompson.

From this judgment Evans, warrantor, is the only appellant—other parties having acquiesced therein.

The defendants tendered an exception of no cause of action, coupled with a general denial and a special defence as to their warrantor, Evans, and he tendered the two following exceptions, viz.:

1. That the judgment the plaintiff obtained in the United States Circuit Court against Phillip Thompson is an absolute nullity on its face, in that it alleges that the plaintiff, Joel B. Wolfe, was doing business and obtained said judgment under the firm name and style of Udolpho Wolf, Son & Co., in violation of a prohibitory law of the State of Louisiana and of the State of New York, where he resides.

2. That since the institution of this suit plaintiff has proceeded by *fi. fa.* to execute his judgment by the seizure of his debtor's property situated in the parish of Acadia, and for which cause this suit should be dismissed.

These exceptions were overruled, and the ruling of the judge *a quo* constitutes the chief ground of appellant's complaint.

No particular stress is laid on the defendant's exception of no cause of action, and it is manifestly without any merit, as will be seen from the averments of the petition we have quoted.

But counsel earnestly insists upon the first exception of the warrantor, Evans, which is to the effect that the plaintiff's judgment against Thompson is an absolute nullity *on its face*, in that it discloses that he did business in the social name of Udolpho Wolf, Son & Co., in violation of a prohibitory statute of the State of Louisiana and a like statute of New York.

It appears that on the trial of this exception the warrantor, Evans, offered in evidence the certified copy of the judgment which had been recorded so as to operate a mortgage, for the purpose of showing the nullity of that judgment *on its face*, as alleged in his exception. Plaintiff, in turn, offered the *entire* Circuit Court record, pleadings and evidence, which was objected to by warrantor's counsel, and the objection was sustained and plaintiff reserved a bill of exceptions.

In so doing the district judge ruled correctly. The exception urged was to the effect that the plaintiff's judgment was absolutely null, and that such nullity was apparent *on its face*, and, of course, the *sole* proof of such exception must be found in the judgment itself. Looking at the judgment we find its recitals to be as follows, viz.:

"It is ordered, adjudged and decreed that the plaintiff, Joel B. Wolfe, *residing in the city and State of New York, and there doing business* under the firm name and style of Udolpho Wolf, Son & Co., *and a citizen of the State of New York*, do have and recover of and from the defendant, Phillip Thompson, the sum of $3768.90," etc.

. And looking into the statute which is relied upon, we find it to be as follows, viz.:

"Hereafter, no person shall transact business in the name of a partner not interested in his firm, and when the designation 'and company,' or '& Co.' is used, it shall represent an actual partner, or partners." R. S., Sec. 2668.

The succeeding section declares that a person offending the foregoing prohibition shall be deemed guilty of a misdemeanor and fined.

It will be observed that this statute does not formally and in terms pronounce the nullity of transactions in violation thereof; but counsel's contention is that we must connect this statute with that provision of the code which declares that "whatever is done in contravention of a prohibitory law is void, although the nullity be not formally pronounced." R. C. C. 12.

Accepting warrantor's theory as correct, for the purpose of argument, and yet we find the proof impertinent and inapplicable, in that it does not show that plaintiff ever did any business in the State of Louisiana; on the contrary, the judgment invoked affirmatively discloses that plaintiff resided in and was a citizen of the city and State of New York, and was *there* engaged in business at the time the defendant contracted the indebtedness on which same is predicated. Hence the *Louisiana* statute was not violated, by virtue of the fact that the plaintiff conducted business in the city and State of New York "under the firm name and style of Udolpho Wolf, Son & Co."

It is therefore clear that the decision of the question must be controlled by the statute of New York.

Of what is the statute law of the State of New York on this ques-

tion, there is no proof in the record, but we are cited to the case of Kent vs. Majoiner, 36 An. 259, in which we said that the provisions of statute (R. S., Secs. 2668, 2669) is " borrowed from the New York legislation on this subject. Chap. 281, S. S. Laws 1838."

This declaration is controlling in this respect and imports full proof of the existence and purport of the New York statute. Consequently it is our duty to examine and apply the jurisprudence of the New York courts to the statute and thus ascertain whether plaintiff is amenable thereto, and his judgment absolutely void on that account; and for that purpose we make the subjoined extract from the opinion in that case, viz.:

"The highest court of that State (New York) has had, twice at least, occasion to consider and expound the purpose and scope of the statute, and has emphatically announced that its intent was to prevent the use of the name of a person not interested in a firm, and thus inducing a false credit to which it was not entitled, and this on the strength of a name which had been withdrawn, or which there was no authority to use.

" It was against fraud and imposition which might be practiced upon innocent parties who dealt with the person who transacted business in the name of a party whose interest had ceased, or who never had any in the same, that the statute was directed. Beyond this the statute can not be extended by implication, or even by a liberal construction. 83 N. Y. 74; 72 N. Y. 198; 50 N. Y. 314. Also 5 Wheaton, 56; 7 Wallace, 486; 12 How. 83."

Having made the foregoing analysis of the New York jurisprudence on the subject and cited the foregoing decisions of the courts of that State, we made the following application of the principal announced to the case under consideration, namely:

"We fully concur with that able court, and hold that the object of the law was to prevent the *obtaining* and *enforcing* of credit, secured by fraudulent representations, and that it was not designed to prevent the innocent infringer of its prohibition from *giving* credit, and, after it was given and the day of settlement had come, from demanding reimbursement, or satisfaction, to the full extent of his rights, from the benefited obligor. It would be, in the highest degree, inequitable and unjust to permit a debtor to repudiate a contract, the fruit of which he retains. The penalty attached to an infraction of the law could be inflicted, in a criminal prosecution, only

at the instance of one wronged by the obtaining of an unfair or undue advantage, procured by false and fraudulent representations, by one clearly in contravention of law.

"Whatever the statute and the penalty affixed to its violation may be, we are clear that the penalty can not be extended to a *civil* case, when the action is to recover money from one to whom it was lent, or to whom credit was *given*, who was not deceived, and who lost nothing by his dealings with his creditor. * * * Dwarris on Statutes, 248; Sedgwick Stat. and Const. Law, 73: 9 An. 251; 10 An. 346."

See also to same effect Halliday vs. Bridewell, 36 An. 238; and Succession of Boffinschen, 29 An. 711.

Taking the opinion in Kent's case as our guide it is clear that, under either the New York or Louisiana statute, it is the *transaction of a business* that is aimed at; and that it is the *partner* violating its terms, and not his *customer*, who incurs its penalty.

But counsel's contention goes further, and is to the effect that, notwithstanding the *debtor* of such a partnership can not be heard to plead the nullity of his engagements, on account of the *creditor's* violation of the statute, yet that that rule of exclusion has no application to a third person, such as a third possessor.

While it is true that a third possessor holding title to property judicially mortgaged for his vendor's debt may collaterally attack the validity of the judgment which is the foundation of the judicial mortgage which is sought to be enforced against it (Bernard vs. Vignaud, 10 M. 482), and show that same is null for any cause inherent to the judgment itself (Peets vs. Wilson, 19 La. 478); yet his rights, in this respect, are just the same as those of his vendor as judgment debtor—no greater, and nothing less. Between the vendor and vendee there is a privity of contract which entitles the latter to *exercise* any right of the former for his protection, notwithstanding he may have renounced or abandoned them. But it can not be argued from that premise that the third possessor could exercise the rights of the State and invoke the penalty of the statute against his vendor's creditor, *in a manner different or more effectively than his vendor could have done.*

To assent to such a proposition would be to say that the debtor might do indirectly what he would not be permitted to do directly.

We are clearly of opinion that this exception of the warrantor was correctly overruled.

His second exception is tantamount to a plea of discussion; and subsequent to same being filed plaintiff filed a supplemental petition admitting the seizure and sale under *fi. fa.* of certain property of Thompson in the parish of Acadia, and requested the court to permit him to credit his judgment with the *net* proceeds of the sale. This necessary leave was granted, the judgment accordingly credited, and the exception overruled, and it passed out of the case.

That was the proper solution of the exception, and the ruling was undoubtedly correct.

A further objection is urged in argument as one arising on the face of the plaintiff's petition and judicial mortgage, to the effect that the *registry* of the judgment was effected on the day following that on which it was signed, and further to the effect that plaintiff admits that at the *time of registry* the warrantor, Evans, was the owner by purchase from his debtor, Thompson, though his title was not registered until the day after his judicial mortgage was recorded, and consequently *his* property was not affected by it.

Citing this state of facts counsel makes reference to the provisions of R. S. 2501, requiring notaries to deposit all acts passed by them in country parishes in the recorders' offices "*within fifteen* days at farthest after same shall have been passed," and also those of Act 143 of 1888, declaring that judicial mortgages shall only take effect from the day of the adjournment of the court rendering the judgment; and insist that in the first place the law imposed no duty on the warrantor to file his deed of sale and have it recorded until after the lapse of fifteen days from the 9th of December, 1890, the date of its passage before the notary; and in the second place that the registry of plaintiff's judgment on the day after it was signed had no effect until after the adjournment of the court rendering the judgment.

The answer to the first proposition is plain, and it is that the section of the statutes quoted gives to notaries no limit within which to file acts passed by them, but requires them absolutely to file them "*within fifteen days* at farthest after the same shall have been passed." It makes it permissible for same to be filed *at any time* after their passage.

The code declares, in most emphatic terms, that "the judicial mortgage takes effect from the day on which the judgment is recorded," etc. R. C. C. 3322, 3329.

And this without regard to the date on which the court rendering the judgment adjourned.

This question was carefully examined and decided in Chaffe & Sons vs. Walker, 39 An. 35; and we are of opinion that the opinion therein announced is correct, and will bear the test of the closest scrutiny; and it is consequently affirmed.

It is true that Act 143 of 1888 has been since enacted; but that statute does not militate against the force and effect of that decision, as an examination of it will attest that it is restricted in terms to the *rank of conflicting judicial mortgages* and has no application to the parish of Orleans. Its provisions are as follows, viz.:

"The judicial mortgage takes effect from the day on which the judgment is recorded in the manner hereinafter directed: *Provided*, that judgments, *the parish of Orleans excepted*, rendered at any term of court, shall have no effect to create a judicial mortgage, *as between judgment creditors*, until from the day of the adjournment of the term at which the same was rendered, although recorded prior to the adjournment of said term." Act 143 of 1888.

They are clear to the effect that they do not apply to the parish of Orleans, and are limited in their effect to the *rank* of *conflicting judicial mortgages* in other parishes of the State.

On the evidence it is clear that plaintiff's judgment was rendered and signed in the parish of Orleans, and that plaintiff's mortgage is the *only* one on the defendant's property. Under the statute of 1888, as well as under the code, the registry of plaintiff's judgment operated as a mortgage on Thompson's property from the date it went to record in the parish of St. Landry. That statute conformed Art. 555 of the Code of Practice to R. C. C. 3322, and 3329, as interpreted in the Walker case; only altering the rank of *competing mortgages*, so as to prevent any inequality in the payment of several judgments, rendered at the same term of court, though registered in the book of mortgages at different dates.

We have given this case most careful consideration, and arise from the study of it with the clear conviction that the judgment appealed from is correct.

Judgment affirmed.

ON APPLICATION FOR REHEARING.

This application is made for the *exclusive* purpose of obtaining an alteration of the judgment appealed from, which is *absolute*, and orders the hypothecated property unconditionally sold to pay the

hypothecary indebtedness of his judgment debtor, Thompson—the appellant's contention being that plaintiff is only entitled to a judgment in the alternative, commanding defendants and third possessors "either to give up the property or pay the amount for which it stands hypothecated." C. P. 68, 74.

We are of opinion that he is entitled to this amendment. *Vide* Desorby vs. Carmena, 9 An. 180. Taking that case as our guide, we will so alter our decree as to make it conform thereto; but for that purpose a rehearing is unnecessary.

It is therefore ordered, adjudged and decreed that the judgment and decree appealed from be so altered in phraseology and amended as to read as follows, viz.: "It is ordered, adjudged and decreed that the defendants deliver up the hypothecated property which is described in the plaintiff's petition, to be sold in satisfaction of the plaintiff's and appellee's hypothecary claim as set forth in his petition, viz.: the sum of thirty-seven hundred and sixty-eight and ninety-hundredths dollars ($3768.90), with 5 per cent. per annum interest from March 21, 1890, until paid, and costs, subject to a credit of eleven hundred and forty-eight and ninety-nine-hundredths dollars ($1148.99), with like interest."

And it is further ordered and decreed that, in default of defendants' surrendering said property for sale as aforesaid, within ten days from demand, that said defendants pay to the plaintiff the aforesaid sum, with interest and cost of suit, not including costs of seizure and sale of the mortgaged property, which must be paid from the proceeds of sale when made, the costs of appeal to be taxed against the plaintiff and appellee.

It is further and finally ordered and decreed that, as thus amended, our former judgment remain undisturbed.

Rehearing refused.

No. 1437.

BERNICE M. LAMBERT VS. MARY CRAIG.

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A plaintiff in a petitory action against a party in possession of the property, exhibiting title, must recover on the strength of his title. Resting his title on a tax deed, he must not only show a *prima facie* title, but one absolutely good. The recital in a tax deed that all the requisites of law were complied with will not excuse the production of proof *aliunde* that the essentials prerequisite to the sale were complied with.

The effort of plaintiff in a petitory action to sustain his title by a plea of prescription against an attack thereon by defendant can not be countenanced.

Where two parties claim the same property, under different conveyances, and one of them leases the property from the other, he abandons his title and can not afterward set up the same title against the party from whom he leased the property.

In tax sales under the Revenue laws as they formerly existed, notice to the tax-payer was an essential prerequisite to the seizure and sale. Where the law provided that a curator *ad hoc* must be appointed to the non-resident tax-payer, upon whom notice was to be served, the failure to have such curator *ad hoc* appointed renders the sale absolutely null and void.

APPEAL from the Eleventh District Court, Parish of Acadia. *Perrault, J.*

Kenneth Baillio for Plaintiff and Appellee.

Edward L. Wells for Defendant and Appellant.

The opinion of the court was delivered by

McENERY, J. This is a petitory action instituted for the recovery of S. ½ and N. W. ¼ Sec. 27, T. 10 S., Range 1 West.

Plaintiff claims title through a tax sale made to one D. Webster in 1876 by the tax collector of the parish of St. Landry, and the defendant claims by purchase from John Craig, Robert Craig and John Craig, Jr., who purchased from the State of Louisiana in 1871 and in 1872, and who also claims through tax sale to Thomas Rice, September 3, 1881. The tax sale to Rice was in fact to the defendant, Miss Mary Craig, as she paid the amount for which the property was adjudicated and at her request the deed was made to Thomas Rice.

Prescription was pleaded by both parties. The plaintiff, attacking the title of a party in possession, can not sustain his title by a plea of prescription. As stated in Waddill vs. Walton, 42 An. 776, "the effort of the plaintiff in a petitory action to sustain his title by a plea of prescription against an attack therein by the defendant in possession can not be countenanced. The plaintiff has cited no precedent for such a reversal of the ordinary principles of pleading and of prescription, and we shall not establish one." The defendant's actual and corporeal possession of the property first dating from the time the lease of the property to one Richard has not been sufficient to maintain the plea. There are several other preliminary questions

which it is not necessary to notice. The defendant is in possession, and the plaintiff must show a better title than the defendant, and being the attacking party, setting up a tax sale as the basis of his title, it must not only be *prima facie* good, but absolutely good. 42 An. 766.

The question then is as to the validity of the tax deed to Webster in 1876, under which the plaintiff claims, and if this is valid, whether the plaintiff, who purchased from Richard, the lessee of the defendant, is estopped from disputing the title of defendant to the property. The many questions presented and discussed with exhaustiveness by the district judge, need not therefore, under this view of the issues raised, be reviewed in this opinion.

There was judgment for plaintiff and the defendant appealed.

The tax deed to D. Webster, author of plaintiff's title, is radically defective, and the statement in the deed that "by virtue of the power in me vested by law, and strictly in accordance with all the legal provisions in such case made and provided, I, J. L. Morris, collector of State and parish taxes for the aforesaid parish, did seize and advertise for sale," etc., will not cure the omissions of acts necessary for the validity of the sale of said property.

There was no notice of the delinquent tax, and as the law then existed, no curator *ad hoc* was appointed to represent the absent owner. Attempts were made by plaintiff to prove that all necessary acts were done and the curator *ad hoc* appointed; but the proof fails to establish the fact of the existence of these essentials.

There is no recital that a curator *ad hoc* had been appointed and no proof *aliunde* that one had been appointed, as was required by the revenue act under and by virtue of which the property was sold.

The tax sale was therefore absolutely null and void for this reason. Roff vs. Lowry, 30 An. 1275.

No notice was served on the tax debtor. The law required a written or printed notice to the agent or owner of the assessed property, and after the expiration of ten days, if the tax was not paid, the tax collector was authorized to seize and sell. The notice was an essential prerequisite to the seizure, and this could only be served on the owner personally or on his agent, or by service on a curator *ad hoc* to represent him.

It is elementary, and this court has frequently held, that non-

compliance with the statutory requirements and preliminary acts as to tax sales operates to vitiate such sales. Villey vs. Jarreau, 33 An. 296.

If the deed even exhibited a *prima facie* title to Webster, through whom plaintiff claims, the plaintiff suing for title against one in possession exhibiting title must show more than this. He must exhibit a title absolutely good, upon the strength of which he must succeed, and not the weakness of defendant's title. 42 An. 763.

This case was before this court at its session in July, 1892, and is reported in 44 An. 885. The present defendant was then plaintiff suing for title, the present plaintiff being the defendant, setting up tax title as in this suit.

The facts are stated in the opinion of the court. The inquiry in the lower court had been exclusively directed to one of possession, and this court considered only the fact of possession, and remanded the case for a trial as to title. Mary Craig, the then plaintiff, was maintained in possession, and the defendant, plaintiff now, instituted this petitory action against her. All questions, therefore, in this suit as to the fact of possession are eliminated from the issues involved.

Richard, who purchased from W. W. Dusson as the agent of D. Webster, who held the tax deed of 1876, leased, after his purchase, the property from Mary Craig. In fact the tax deed to Webster seems to have been ignored by W. W. Dusson and by the vendee of Webster. W. W. Dusson, in 1884, was corresponding with the present plaintiff, advising her as to the danger she ran by permitting the property to be assessed to Thos. Rice instead of being assessed in her own name, and also receiving money from her to pay taxes, or at least he knew of the amount being forwarded, as in one of his letters he inquires why she forwarded so large an amount to pay the taxes, when only a tax of ten dollars was due. He acknowledged her title to said property by an offer to purchase from her. There was, as it appears, a double payment of taxes on the property. C. C. Dusson, sheriff, says Webster paid the taxes to the time of sale of the property to Richard, and it is certain, from the tax receipts and the record, that Mary Craig promptly paid the taxes to the tax collector, and it would seem at times through C. C. Dusson, sheriff.

Richard, when he abandoned the title he had received from Webster, by leasing the property from Mary Craig, who asserted

ownership to it, adversely to his title, was forever estopped from asserting title through the tax sale, which he abandoned. As between Richard and Mary Craig, her title was as absolutely fixed as though he had deeded to her the land. When Richard sold to Dusson he was the purchaser of property of another and received no title and could convey none to his vendees.

But the testimony in the record forces the conviction upon us that W. W. Dusson, who had acknowledged Mary Craig as the owner of the property, had actual knowledge of the lease of Mary Craig to Richard, and that Williams and Lambert, the latter the plaintiff, were parties interposed for the real purchaser from Richard, W. W. Dusson. It is unnecessary to review the testimony on this point. It is sufficient to say the correspondence between the parties, between Dusson and Mary Craig, the business relations between Dusson and Lambert lead to this conviction.

It is therefore ordered, adjudged and decreed that the judgment appealed from be annulled, avoided and reversed, and it is now ordered and decreed that plaintiff's suit be dismissed with costs.

No. 1442.

AGLAE LANDRY, WIFE, VS. B. PHILOGENE LANDRY.
DUPLESSIS LANDRY, WARRANTOR.

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The plaintiff in a petitory action must recover on the strength of his own title and not on the weakness of defendant's. A party in possession who is charged with holding possession without title will be maintained in the same against one who exhibits no title at all.

Parol testimony can not be received to establish title to immovable property But where the records have been exposed to fire, some destroyed and others saved in a damaged condition, the vendor's testimony can be received to supply the obliterated parts of the deed.

APPEAL from the Seventeenth District Court, Parish of Vermilion. *Allen, J.*

L. L. Bourges for Appellant.

C. DeBaillon and *Lastie Broussard* for Appellees.

The opinion of the court was delivered by

MCENERY, J. This is a petitory action, the plaintiff claiming ownership of east half of Sec. 22, Township 11 South, Range 2

East, situated in the parish of Vermilion, and containing 321 66-100 acres, and valued by plaintiff at $2500. She alleges that she is the heir of Marguerite Azelia Landry, wife of Maximilian Landry, Jr., deceased; that as such she is entitled to one-half of the succession of said Marguerite Azelia Landry; that she was owner in community with Maximilian Landry, her husband, of the above described property; that one B. Philogene Landry is now in possession of said tract of land; that he took possession of the same, without title, in 1885; that he is a trespasser, and that she is entitled to rent at the rate of $600 a year from 1st of January 1885 to the 1st of January 1892. She prays to be decreed the owner of one undivided half of said property, and for $3600 for rent.

The defendant demanded an exhibition of plaintiff's title. She exhibited an abstract of entries, recorded in the parish of Vermilion, certified to by the clerk of court. The abstract shows that Maximilian Landry entered the above described property April 16, 1860.

The defendant set up title by virtue of an act of sale from Florestin Bourque, June 11, 1881, who some time prior thereto acquired the same at tax sale, which was ratified by Marie Bertrand, widow of Maximilian Landry, Sr.

The plaintiff offered in evidence copy of judgment recognizing her as the heir of Aglae Landry, wife of Maximilian Landry, Jr. This judgment decreed that the property inventoried in the succession of Maximilian Landry, Jr., should be declared community property, and the administrator of said succession was ordered to file a full and complete account of his administration on or before the next regular term of court.

The inventory of this succession is not in the record. If any account was filed it has not been offered in evidence.

There is nothing in the record to show that the property which is claimed by plaintiff was ever in the succession of Maximilian Landry, Jr. The receipt does not show it, and we think the defendant might have safely rested with the close of plaintiff's testimony.

Interrogatories were propounded to several witnesses, and the answers were objected to by plaintiff as being an attempt to prove title to immovable property by parol testimony. The objection was overruled and the testimony admitted. The answers of the witnesses were in the main an attempt to show title by parol testimony. So far

as they were directed to this they were inadmissible. But the records of the parish of Vermilion had been destroyed by fire, and among the lost records was the tax deed to defendant. Marie Bertrand, widow of Maximilian Landry, after the alleged tax sale, made a deed to Florestin Bourque of the property in controversy. The part of the deed remaining, after its exposure to fire, shows that it was made in relation to a prior tax sale. We are of the opinion that her testimony that she had executed this deed to ratify the prior tax sale is admissible under the circumstances of this case.

The widow of Maximilian Landry, Sr., was evidently in possession of the property in 1878, when she executed this deed. The record forces the belief upon us that Maximilian Landry, Sr., entered this land, and in the absence of any testimony to show what was done in that succession or the succession of Maximilian Landry, Jr., we can not presume that she illegally conveyed the land to her vendee, Bourque. The defendant, so the testimony and the record affirm, purchased in good faith from a party whom he believed to be the owner. His vendee purchased from the apparent owner and the party in possession. His title is translative of property. She and his vendee have been in actual corporeal and civil possession for more than ten years. The prescription pleaded must therefore prevail.

But independent of this plea, on a comparison of titles the plaintiff exhibits none, and the defendant set out an apparent valid one. The plaintiff, if the defendant's title is weak, can not avail himself of it, but must present a stronger one.

Judgment affirmed.

No. 1433.

MOORE, MCKINNEY & CO. VS. L. J. RINGUET ET AL.

Plaintiffs' judgment is for an amount *less* than two thousand dollars.

The judgment prayed for, to rescind and annul the conveyance of their debtor, was revocatory and not *en déclaration de simulation*.

In a revocatory action the test of jurisdiction, is the amount claimed by the creditor, and not the value of the property, the sale of which the plaintiffs seek to have revoked.

APPEAL from the Twelfth District Court, Parish of Calcasieu. *Fournet, J.*

Mitchell & Mitchell for Plaintiffs and Appellants.

A. P. Pujo for Defendants and Appellees.

STATEMENT OF THE CASE.

The opinion of the court was delivered by

BREAUX, J. The plaintiffs are the creditors of the defendant, L. J. Ringuet, in the sum of $849.47, and interest thereon at the rate of 5 per cent. per annum from the 25th day of April, 1892, and for the further sum of $12, cost of suit, for which they obtained judgment against him on the 30th day of May, 1892.

The other defendant, the wife of L. J. Ringuet, after her marriage, more than twenty-five years since, inherited an amount from the succession of her father and a small sum from her mother's estate.

In 1868 the husband, Ringuet, made a *dation en paiement* to his wife and declared in the notarial act that the remainder of his indebtedness to her was $894.

In 1879 the wife sold a tract of land in Iberia parish for the sum of $1250. In the deed of sale she declared that it was transferred to her by her husband as a *dation en paiement*, as per act before E. Paraut, notary public, on the 20th day of August, 1879, and she and other witnesses in her behalf testify that the price was received by the husband and expended by him.

In May, 1892, Ringuet made affidavit before the clerk of the District Court of indebtedness to his wife in the sum of $2950, which he acknowledged having received and expended for his separate use and benefit.

Immediately after, he conveyed all his property, valued by him at the sum of $2700, leaving due her $250.

In the act, the transferrer declares that in the year 1870 or 1871 he made a *dation en paiement* to his wife of certain property consisting of about 110 acres, in satisfaction of the sum of $1250, her paraphernal claim.

In the paragraph following, of the deed of sale, he declares that this property, conveyed to his wife in part satisfaction of her paraphernal claim, was sold to one Thomas Simon, for the sum of $1250

and which amount was appropriated by him, the vendor's husband, after the sale, to his benefit.

This is the land to which we have before referred as being situate in the parish of Iberia.

PLEADINGS.

The plaintiff, in his petition, alleges substantially that the *dation en paiement*, of May, 1892, was a fraudulent scheme in the interest of the husband to defeat the claims of his creditors.

That he was not indebted to his wife, and that she participated in the fraud.

That it was a mere simulation.

That they will lose their claim should the said *dation en paiement* not be rescinded and made subject thereto.

That the property conveyed for $2700 is worth $5000.

That by this conveyance the husband was left without property and insolvent.

Petitioners pray for judgment against Ringuet and wife revoking and rescinding the said "pretended *dation en paiement*," subjecting "the said property to the creditors of the said L. J. Ringuet, and particularly to the judgment of your petitioners herein set forth."

The defendant, the wife, in her answer, alleges that the conveyance of the property to her by her husband was real and *bona fide*.

She also alleges that there was error in the deed of May, 1892, which she applied to correct.

The error, she avers, was in the declaration contained in the deed, that her husband made a *dation en paiement* to her in 1870 or 1871, for the sum of $1250.

The fact being, she alleges, that the amount was $2083, and the date March 20, 1868, which left a balance of $859.55 due her, together with the $1250 sale to Simon, aggregating $2109.55.

She prays to correct the error alleged and for judgment recognizing her as owner of the property.

The judgment of the District Court was pronounced in favor of the defendant; plaintiffs' demand was rejected.

From the judgment plaintiffs appeal.

The defendants move to dismiss the appeal on the ground that this court is without jurisdiction *ratione materiæ;* that the amount involved is less than $2000.

ON THE MOTION TO DISMISS.

If the action is revocatory, this court is without jurisdiction.

To determine that the action is *en déclaration de simulation* would involve a decision that no consideration passed; that the title had no element of the real, and that possession was not surrendered under the deed.

Conceding for the moment that the defendants have not proved the entire consideration alleged, it does not appear, under the allegations and the proof, that the title is one which does not confer any right at all, and that it is a mere simulation.

The plaintiffs judiciously chose to proceed by direct action.

The conveyance could not be treated as entírely simulated, for the reason that the defendant, Mrs. Ringuet, is in possession under a title; that that title is based upon consideration which may not be sufficient to successfully defend against an attack to set it aside as in fraud of creditors, but is sufficiently real to compel creditors to resort to a suit to have it revoked and annulled.

It is, to say the least, sufficiently real to escape from being characterized as *corpus sine anima, extrinsicus apparens, intrinsicus nihil habens.*

The wife obviously was a creditor. It is sufficient for us to determine that there is at least an appearance of reality in her claim.

The form of the action and the allegations taken in their entirety sustain the conclusion that it is revocatory; the evidence establishes that she was a creditor; the amounts of the credits must be determined by the appellate court having jurisdiction and errors corrected by it, if any were made, as alleged by defendants. Should the sale be revoked, the rights of the creditor can not be ignored; they must be considered and passed upon in a revocatory action.

Our conclusion being that the action is revocatory the amount claimed is the test of our jurisdiction. Katz & Barnett vs. G. G. Gill et al., 48 An. 1041.

The Supreme Court is without jurisdiction of a suit on the part of a creditor for an amount less than two thousand dollars, to annul a transfer of property made by his debtor, as fraudulent, to subject it to the payment of his claim. Walter C. Flower vs. A. C. Préjèan et al. 42 An. 897.

The counsel for plaintiff directs our attention to Godshaw & Plant vs. The Judges of the Second Circuit Court of Appeals, 38 An. 643.

The court in that case holds that in an action by a judgment creditor to have the purchase of the property declared simulated and to be in reality for account of the debtor, the value of the property and not the amount of the judgment is the matter in dispute.

The question in that case was purely one of simulation *vel non*. There was not an appearance of reality in the conveyance.

It was charged that the purchaser was an interposed person, and nothing created the impression of reality of the sale.

In the other case referred to, that of John Chaffe & Sons vs. D. D. Demoss and wife, 37 An. 186, it was held that the appellees who had moved to dismiss could not successfully invoke the cases of Loeb & Bloom vs. Arcot, 33 An. 1086; Zuberbier & Behan vs. Morse, for the reason that each was revocatory. These cases support defendant's contention, the action being revocatory.

In the case to which we have just referred, 37 An. 186, the court expressly held that it is practically the action in declaration of simulation and not the revocatory action.

In the case of State ex rel. Bloss vs. Judges of Court of Appeals, 33 An. 1352, another case referred to by plaintiffs, the court held that the object of "the rule was to have the mortgage canceled on the ground that it was simulated and unreal."

The court is without jurisdiction *ratione materiæ* to establish the amount of the consideration which is real and not subject to successful attack on the part of a judgment creditor for an amount not within this court's jurisdiction.

The appeal must be dismissed.

The appeal is dismissed at the costs of appellants.

No. 1446.

ANNIE W. WILKINS VS. ADELIN DURIO ET AL.

Plaintiff placed the title to her property in the name of her creditor as owner as security in his favor.

Many years afterward it was conveyed by the party in whose name the title was to a third party, with plaintiff's consent.

Plaintiff subsequently became the lessee of the property.

It not being proven that the parties intended to create an act of mortgage in adopting the form of the sale:

The consideration not being greatly inadequate:

The act of sale and the lease concurring in sustaining the sale, it must be held that it was a sale and effect given to the authentic deed between the parties.

APPEAL from the Nineteenth District Court, Parish of St. Martin. *Voorhies, J.*

William H. Peterman and *E. Simon* for Plaintiff and Appellant.

Thomas H. Lewis, James E. Mouton and *Robert Martin* for Defendants and Appellees.

The opinion of the court was delivered by

BREAUX, J. The most valuable portion of the land claimed by the plaintiff was sold to her by Zenon Broussard in 1878 for the price of $8930.66.

A short time prior to that year her vendor, Broussard, under sheriff's adjudication, had acquired it for $5700.

The other portion she claims as forming part of the plantation was sold to her also by the said Broussard; it consisted of, a small adjacent tract.

At the time of Broussard's death in 1881 the plaintiff was indebted to him in the sum of $8720.70, and several years' interest, being the unpaid purchase price on the plantation.

His widow, at the sale of the property of his succession, became the owner of the notes made by plaintiff and representing the purchase price of the plantation.

The owner of these notes, Mrs. Broussard, recovered judgment upon them in 1883, and granted a stay of execution until February, 1884.

In 1885 Mrs. Neblett, plaintiff in this suit, sold the plantation to Mrs. Broussard the holder of these notes, the amount and interest of which amounted at the time to $13,484.47.

The deed recites that the plantation is conveyed and *given in payment* in satisfaction of vendor's indebtedness to vendee.

The act contains the recital "that the vendor (Mrs. Neblett) will continue to live and reside on said plantation until the 1st of February, 1886, on which day she will move away from and vacate the premises and deliver actual possession of all of said property."

"And that in case she should refuse to vacate and deliver the said plantation," she obligated herself to pay the sum of $500, and all other damages."

Mrs. Broussard, the vendee, bound herself to reconvey the plantation to the vendor upon the latter's payment to her of $9000, at any time prior to the 1st of February, 1886.

Mrs. Neblett remained in possession.

She was called upon by her creditor, Mrs. Broussard, for the amount due.

A short time subsequent, *i. e.* in 1886, plaintiff's brother called on Mrs. Broussard and obtained from her the promise to take $6000 in cash and $3000 on time in satisfaction of her claim.

He offered his note for the credit portion of the payment, and this Mrs. Broussard consented to accept.

Subsequently to this instead of the $3000 in notes, she agreed to take $1500 in cash.

Mrs. Broussard, after this agreement, authorized her agent to sell the plantation for an amount not less than $6000.

At this point of the case the defendant, Durio, became a party to the transactions.

The agent of Mrs. Broussard, Judge C. H. Mouton, called on Durio and offered to sell a portion of the place for that price.

This was declined.

Plaintiff's brother informed the witness that he would pay to the agent the $1500, before mentioned, if he sold to Durio. There was no agreement whatever entered into between him and the said defendant, Durio, about this amount.

He sold to him for the price of $6000, without reference to any other amount.

The act of sale by Mrs. Broussard to the defendant, Durio, bears date 4th May, 1886.

It is unconditional and absolute. The purchase price was paid cash as recited in the deed. No reference is made in this deed to any loan made to Mrs. Neblett, or to any right of hers on the property.

The same day the purchaser, Durio, leased the plantation to Mrs. Neblett for the sum of $488.20 annual rental and all the taxes on the place each year of the lease. This lease was entered into for the term of three years.

Immediately after these acts were executed the defendant, Durio, by authentic act, promised to sell the plantation to the lessee, Mrs. Neblett, for $6102, provided she paid him that sum on or before 31st December, 1888.

In default of payment the promise to sell "was to become null and void *ipso facto*." It was agreed that the same stipulation should also apply if the rent notes were not promptly paid at their maturity.

At the expiration of this lease it was renewed for three years, also the promise to sell.

About twenty days prior to the expiration of the lease and the term of the promise to sell, Durio notified the plaintiff that he would not renew the lease and that he would take possession at the end of the year.

The plaintiff, Mrs. Neblett, wrote to the defendant: "We expect to have the amount ready for you in time, as we know it is due; and should we not, we know of course we must give possession according to agreement."

The value of the place is one of the issues presented.

The estimates of witnesses who testified upon the subject greatly differ and is quite contradictory.

The amounts for which lands were sold in the vicinity offer a safer criterion of value, also the price this plantation sold for at different times, together with the testimony of witnesses, who somewhat accord in their estimate, with the market value of the plantation as established by sales and transactions. Hollingsworth vs. Hollingsworth, 45 An.

The amount of the annual lease of the place.

The price at which the plantation was sold at sheriff's sale.

The abandonment of amounts by the owner, Mrs. Broussard, and the amount she was willing to take for her claim and which she finally accepted, do not prove correctness of the high estimate of a few of the witnesses.

Plaintiff obtained possession at the expiration of the lease.

These are the facts.

ON THE MERITS.

Plaintiff's petition sets forth clearly the grounds upon which she relies to have a contract, evidenced by authentic act, declared to be a mortgage or security for debt.

She avers that the *dation en paiement* by Mrs. Broussard to her was never intended to divest her title to the property, for she never claimed title or possession as owner, but left her in full control.

That the office of the *dation en paiement* was to secure the indebtedness by placing the title in the name of Mrs. Broussard.

She alleges that Durio loaned her the amount, and desiring to indemnify him against all loss and to secure him, she consented that proper title to the same should pass directly from Mrs. Broussard to Adelin Durio, "it being further agreed that the annual interest of said loan should be secured to the said Durio by obligations in the shape of rent notes, and that the return of the title to said property to her name should be warranted by a promise of sale on the part of said Durio."

The defendant interposed an exception that plaintiff, as a condition precedent to the institution of her action, should have tendered reimbursement to the defendant.

The defendant pleads the general issue, and sets forth the different transactions and grounds upon which he relies.

The judgment of the court *a qua* was pronounced in his favor, from which the plaintiff appeals.

The counsel for plaintiff disclaim that the action is revocatory or to rescind any of the acts connected with the title to the plantation, in this suit.

They argue that the deed from their client to Widow Broussard did not operate a divestiture of title, and they contend that the defendant knew that the plaintiff was the owner of the land, and in possession, and urge that the defendant took proper title from Widow Broussard as security for his loan.

The relief prayed is that the defendant shall convey, under the judgment for which they sue, title to the property, and that his claim be recognized as a lien upon the property, and that she have reasonable time within which to pay it, and that possession of the property be delivered to her.

The evident purpose is to apply the principles laid down in Howe, Executor, vs. Powell et al., 40 An. 808; and in other authorities referred to in that decision in the case at bar.

The doctrine is stated as being settled that redeemable sales, unaccompanied by delivery of the thing sold, of which the consideration is inadequate, will be treated by courts, without sufficient evidence to the contrary, as contracts for which the thing nominally sold stands as security and nothing else.

It devolves upon the plaintiff to bring her cause within the application of these principles, that she may sustain her contention.

The Broussard act remained in the record, unquestioned as a sale,

during nearly an entire decade, during which plaintiff was the vendor, without any written evidence whatever that she was the owner.

The vendees during the time have passed away.

The secret equities existing at the time, the verbal promises and conversations are now invoked by plaintiff as affecting the authentic act.

That which was a sale on the face of the papers would now be changed by plaintiff to a mortgage conferring hypothecary rights.

The verbal agreements, as testified to on the trial, are doubtless true.

But how unstable and uncertain would be title to immovable property if, after so many years, parol evidence were admissible to alter and change them.

The owner, who appears of record as defendant's immediate author, desired to realize, it is said, the amount of her claim on the property.

It was known to plaintiff prior to the sale that she was offering the property for sale for an amount not less than $6000.

The plaintiff did not protest against the inadequacy of the price. She did not in the least object—on the contrary she gave the offer her unqualified approval, and sought and earnestly requested the defendant to become the owner. He finally consented and purchased. In all the preliminaries preceding the sale the plaintiff did not make any attempt to secure the recognition by an act or the least writing, of the right she now sets up to the property.

Immediately after the sale she became the lessee of the property. During these years she held it as plaintiff's lessee, by authentic act.

She during the whole time unqualifiedly admitted that plaintiff was the owner.

At the end of the three years the contract of lease was renewed, and during three more years she continued holding for the plaintiff as his lessee of the property.

On the face of the papers the defendant is a third person as to all transactions and acts preceding the one under which he became the owner.

His relation to these transactions can not be changed and he made a party to them, or affected by them, by verbal contradictory statements.

"When parties really intend to create a mortgage for the security

of an existing or contemplated debt, and adopt the form of a sale with a counter letter, which, taken together, exhibit such intention, the contract will be construed as a mortgage, and effect will be given to it accordingly. But when the act of sale and the counter letter both concur in asserting that it is a sale, the letter containing the agreement that the vendor may redeem within a given time, it must be held to be a sale with the right of redemption, and if the right is not exercised within the time agreed on it is lost forever." 35 An. 271.

The act of sale and the lease in the case at bar both concur in establishing that it is a sale and not a mortgage.

She was, it is true, in possession, but her possession was not that of an owner.

She paid the taxes on the property—these taxes in the contract of leases he bound herself to pay.

The price has not the feature of "vile" or gross inadequacy as was the case in 40 An. 307.

So that the case at bar differs from those in which this court has interpreted certain contracts as securities for the payment of debts, and not as sales as they purported.

Parties have none to blame but themselves who remain quiescent, or who hastily lend their approval, without securing themselves against the force and effect of authentic deeds.

Having reached this conclusion as to the legal effect of defendant's authentic deed of sale, the objection to the process of ejectment and the legal proceedings by which defendant obtained possession lose importance.

The plaintiff urges certain grounds that would have been substantial and of some avail, if petition for conveyance, by proper muniment of title, had been granted.

Moreover, there was a settlement after the proceedings of ejectment, a compromise entered into and payment made, which concludes plaintiff.

It is therefore adjudged and decreed that the judgment appealed from be affirmed at plaintiff and appellant's costs.

No. 1438.

CARMELITE THIBODEAUX, WIFE, ET AL. VS. VALERY THIBODEAUX, ADMINISTRATOR.

1. An appeal bond which is executed by the defendant, in his individual and personal capacity, does not respond to an order of appeal granted in favor of the same person in his fiduciary capacity of administrator of a succession.
2. An appeal bond in the recitals of which no mention is made of the suit in which the judgment appealed from was rendered, either by number, title, amount, character or court, specifically, or in substance, does not conform to the requirements of the law.
3. Were an adverse judgment rendered against the appellant by this court, there would be nothing discoverable on the face of the bond which could connect such decree with the one appealed from, or which would enable the lower court to fix the liability of the sureties of the appellant.

APPEAL from the Nineteenth District Court, Parish of St. Martin. *Simon, Judge ad hoc.*

J. E. Mouton for Plaintiffs and Appellees.

C. H. Mouton and *Robert Martin* for Defendant and Appellant.

ON MOTION TO DISMISS APPEAL.

The opinion of the court was delivered by

WATKINS, J. The motion is grounded on certain alleged radical defects in the confection of the appeal bond, which render it nugatory.

They may be enumerated as follows, viz.:

1. That whereas a judgment was rendered against Valery Thibodeaux, administrator, and an order of appeal was granted in his favor as such administrator, the bond is drawn and signed by Valery Thibodeaux, individually.

2. That no mention is made, either in the caption or the body of the bond, of the title, or number of the suit, or the number or name of the court which rendered the judgment that is appealed from.

3. That no mention is made, either in the caption or body of the bond, of the date, nature, or character of the judgment; nor of any *indicia* by which the said bond could be identified with the judgment appealed from, or the suit in which it was rendered.

The following is a synopsis of the bond, viz.:

"State of Louisiana, Nineteenth Judicial District, Parish of St. Martin.

"Know all men by these presents, that we, Valery Thibodeaux as principal and * * * as sureties, are held and firmly bound unto Alexander V. Fornet, clerk * * * in the sum of $250, etc.

* * * * * * * *

"Now the condition of the foregoing is such that whereas the said principal herein has obtained an order for a devolutive appeal from the judgment rendered by said Nineteenth Judicial District Court on the — day of ———, to the Honorable Supreme Court of Louisiana, next to be holden at Opelousas, Louisiana, on the first Monday of July, 1893. * * *

"Now this bond is given as security that said *principal*, as appellant, shall prosecute the said appeal, and that *they* shall satisfy whatever judgment may be rendered against them, or that the same shall be satisfied by the proceeds of the sale of their estate," etc.

This bond is signed by Valery Thibodeaux, in his *individual* capacity, and by his securities, and not as administrator.

A casual inspection of the foregoing is quite sufficient to satisfy the judicial mind that each and every one of the charges that are preferred against the bond are true in every particular. Indeed it would be difficult to conceive of an appeal bond more completely barren of all sacramental and essential formalities than the instant one is.

This is an injunction suit in restraint of a judicial sale of succession property, based upon the averment that the defendant administrator was in sufficient funds to pay off the debts of the deceased and hence there was no necessity for a sale; and that a large part of the immovable property advertised for sale constituted an asset of the matrimonial community theretofore existing between the deceased and their ancestor, one undivided one-half interest in which was not liable for the individual debts of the deceased.

The plaintiffs are the children and grandchildren of Aspasie Le Blanc, deceased wife of Treville Thibodeaux, deceased, of whose joint succession the defendant is administrator; and the property, sale of which is enjoined, belongs, in greater part, to said community, and had been ordered to be sold to pay debts as binding on the community and the individual succession of Treville Thibodeaux. On the trial plaintiff's injunction was successful, and was perpetuated

to the extent of restraining the sale of their half of the community property.

From that judgment an order of appeal was granted in favor of the defendant administrator, and in response to said order the bond above outlined was furnished and filed.

It is evident that the bond does not specify the defendant administrator, as appellant, but Valery Thibodeaux, personally and individually. It is not signed by the administrator, or his counsel, but by Valery Thibodeaux, individually. In the recitals of the bond no mention is made of the suit in which the judgment was rendered, either by number, or title, or amount, or character, or court.

In the caption neither is designated, not even in substance. Were an adverse judgment to be rendered by this court, there would be nothing that is discoverable in this bond which could in any way connect such decree with the one that is appealed from, or which would fix the liability of the sureties of the appellant.

There would be nothing in the bond to fix any liability upon the succession of Treville Thibodeaux, or the administrator; and it could not serve as a legal basis for proceedings or execution against the administrator, or the succession.

In Succession of Walker, 32 An. 525, it was held that an appeal bond which contains no mention of the title to the suit, or matter in which the judgment appealed from was rendered, nor of the nature and scope of such judgment, nor of the date of the rendering and signing of the judgment, nor of the name of the party in whose favor it was rendered, nor of the party cast in the suit," is radically defective and can not support an appeal. 6 La. 586; 10 An. 155; 12 R. 205.

It goes without saying that such a bond does not fulfil, not even substantially, the requisite formalities of the law.

Appeal dismissed.

No. 1439.

JOSEPH SOLARI ET AL. VS. AMELINA BARRAS ET AL.

45 1128
106 448

The value of the right involved is within the jurisdiction of this court, as alleged and supported by the inventories taken of the assets of the succession.

45 1128
114 616

If heirship be specially denied it must be proved in order that the heir may maintain his action.

A notary public before whom a will was executed may be examined as a witness in opposition to testimony admitted to impeach the verity of his act.

Solari et al. vs. Barras et al.

APPEAL from the Nineteenth District Court, Parish of St. Martin. *Voorhies, J.*

Jas. E. Mouton and *D. W. Voorhies* for Plaintiffs and Appellees.

C. H. Mouton and *Robert Martin* for Defendants and Appellants.

The opinion of the court was delivered by

BREAUX, J. Plaintiffs allege that they are the collateral heirs of the late J. B. Wiltz, and institute this action to annul his will.

It bears date March 31, 1879.

The testator had no forced heirs.

He bequeathed all his property to his surviving widow.

The grounds of nullity alleged are substantially:

That it was not dictated to a notary; that it was not signed in the presence of witnesses; that the names to the testament were of witnesses called upon by the notary, who signed in the absence of the testator, and did not even know that they were signing an act purporting to be a last will.

That it does not contain certain essential recitals, such as that the testator signed it at all, or that he signed it in the presence of witnesses.

That the inventory shows assets in the sum of $5732.50 to be distributed.

The defendant, alleged legatee, denies plaintiffs' allegations and denies specially that plaintiffs are the heirs at law of the testator.

She alleges that the will was executed before a competent notary, in the presence of five witnesses; that it was nuncupative by public act.

In the alternative she alleges that if the will is not good and valid as a testament by public act, it is valid and legal as a nuncupative testament under private signature.

She prays that plaintiffs' demand be rejected and that there be judgment in her favor maintaining the validity of the testament and decreeing her the sole owner.

The inventory of the community property between the late J. B. Wiltz and his wife, now the defendant, amounted, in the parish of

St. Martin, to the sum of $2811.25, consisting of property movable and immovable in that parish.

In the parish of Calcasieu the inventory of property, part of which is described as community and part as separate, amounted to the sum of $2924.

The testament is written in French, from which we extract and translate:

Appeared before me at my office John Baptiste Wiltz, proprietor, domiciled in the parish of St. Martin, who dictated his testament to me in the presence of the undersigned witnesses, as follows, to-wit:

I give and bequeath to my wife, Amelina Barras, all the property in my possession at my death, to be owned and disposed of by her.

This testament was dictated by the testator to the undersigned notary, in presence of the witnesses, and the notary wrote it as dictated in presence of the witnesses, and read it to the testator in presence of the witnesses.

These formalities were followed in the presence of the witnesses, without interruption and without turning to other acts.

The witnesses and the notary, in the presence of each other, and the testator, signed the act on the 31st day of March, 1879.

Two of the witnesses have died since, one could not be found, and two have testified on the trial.

The latter testified that their signatures as witnesses to the will are genuine, but that they never were witnesses to a testament of the defendant, never were present at the dictation of a will by him, and never were in the notary's office while such a will was being dictated.

The testimony of the notary was ruled out on the ground, *inter alia*, that he could not be heard in proof of essential formalities not stated in the testament itself.

To the ruling a bill of exceptions was taken on the ground that such was not the purpose.

JURISDICTION RATIONE MATERIÆ.

Plaintiffs and appellees in this court move for a dismissal of the appeal, on the ground that the court is without jurisdiction *ratione materiæ*.

The petition for orders to take inventories, in general terms, refers to property of the community; the order on this petition was issued

to make an inventory and appraisement of all the property of the estate.

In the notary's *proces verbal* of the inventory, part of the property is described as belonging to the community, part as belonging to the separate estate of the deceased, and part of the property to the defendant personally.

These inventories are *ex parte*, and do not of themselves fix the ownership of the property.

The jurisdictional allegation of plaintiffs, based upon the inventories, sets forth that the community property amounts to the sum already stated and which is within this court's jurisdiction.

For the purpose of establishing jurisdiction, plaintiffs are bound by their allegations supported by inventories of the property.

They have alleged a total representing community assets.

The inventories, as made, do not make it apparent that their allegation is erroneous.

The question at this time is one of fact, and does not present an issue of ownership, which necessarily must be left to future settlement, and not prejudiced by our conclusion maintaining jurisdiction.

The interpretation placed by the plaintiffs upon the recitals and description of the inventories in alleging in reference to jurisdiction only, is sufficient to maintain the jurisdiction for which the defendant contends. She is the only other interested party in the property.

The plaintiffs having alleged that the community property amounted to more than $5000, and this allegation appearing correct, we will not dismiss the appeal on the motion filed.

PROOF OF HEIRSHIP.

The defendant's first contention is that the heirship of the plaintiffs being denied, they must be held to the proof of heirship, and that as they failed to offer any evidence upon this issue, she is entitled to judgment.

In Blair's Heirs vs. Wade's Heirs, 1 La. 113, the defendants in their answer denied in express terms the capacity and quality of the plaintiffs, named as heirs.

On the trial no evidence was offered to prove heirship.

In the appellate court their counsel relied on the order of the

court below, by which they were permitted to prosecute the suit in the capacity assumed, as dispensing them from proof of heirship.

It was held that this ground was not tenable. The order of the court authorizing them to prosecute the suit as heirs is generally made *ex parte*, says the court, on the mere suggestion of the party interested to obtain it unsupported by any evidence.

"The answer explicitly required proof of heirship on the part of the appellees, and as they failed to make it, the judgment of the District Court must be reversed."

The judgment in this case was one of non-suit.

In Bennet vs. Cignoni, 41 An. 1146, the defendant denied that plaintiff was a legitimate son, as a defence.

The court said that he had not made out his case and dismissed his suit.

The plaintiffs to sustain their suit and to meet defendant's contention refer to a number of decisions.

The first in order of time is the case of Parish of St. John ex rel. Parish Treasurer vs. Shexnaydre, 34 An. 850, from which we quote:

"The exception as to the right of the parish treasurer to sue for and recover such fine came too late, having been made after default. Besides he denied his authority in the premises under the ordinance in question as well as from R. S., Sec. 2641," empowering each officer to direct prosecutions for all debts due the parish.

The case is not analogous. The question was one exclusively of capacity, which was maintained by the court upon grounds entirely different from those involved in the case at bar.

All the other decisions to which our attention is invited by plaintiff's counsel support the proposition that objection to plaintiff's capacity must be pleaded *in limine* when he sues in a representative capacity.

Not one relates to the necessity of proving heirship when denied in the answer.

Those decisions referred to by us are directly in point and support the proposition that plaintiff's authority to sue as an heir must be proved when specially denied in the answer.

The authority of the heir is not representative, but is connected with or part of the right of action to recover, and must be proved, being intimately connected with the claim.

The prayer of the answer, that the plaintiff's demand be rejected

and that her title under the will be recognized, is not a waiver of the special denial, or an admission of plaintiff's right to sue. This demand did not change the onus of proof, or relieve the plaintiff from proving the authority of an heir to sue, where authority is specially placed at issue.

In thus pleading for title under the will, defendant does not admit that which she expressly denies—that is, the heirs' authority to sue.

We will not depart from the authority upon this point laid down in a number of decisions, but we will not extend it further than to dismiss the action.

The failure to make the proof required does not divest the plaintiffs of their rights in a future action.

In every suit, and particularly in litigation arising in the settlement of estates, useless delays should be avoided and the rights of parties finally determined in accordance with the forms and the terms required; we will, therefore, pass upon and decide questions brought up in a bill of exceptions, for it may obviate the necessity of remanding the case, should another appeal be taken.

Part of the excluded testimony of the notary is admissible—that is, that which does not add to, vary, explain or contradict the will.

Certain of the excluded questions propounded were directed to certain statements and declarations in the will.

The testimony of the witnesses to the will should not be considered final.

Other witnesses may be heard upon the subject if they do not contradict the terms of the will.

To illustrate, we will mention that the notary can not be heard to testify that the testator signed the will, it being silent upon the subject, but he is a competent witness to support the defence that witnesses did sign, as declared in the will.

It is therefore adjudged and decreed that the judgment of the court below be avoided, reversed and annulled.

It is further adjudged and decreed that judgment as in case of non-suit be entered against the plaintiff and appellee with costs in both courts.

45 1134
46 472

45 1134
105 702

45 1134
117 582

No. 1448.

GODEFROY DUPRE, ADMINISTRATOR, VS. MRS. M. M. ANDERSON,

AND

MRS. M. M. ANDERSON VS. GODEFROY DUPRE, ADMINISTRATOR.

1. Injunction to restrain the execution of an order of seizure and sale by the debtor, only lies in cases prescribed by Art. 739, C. P.
2. The legal representative of the deceased debtor stands in the latter's shoes and has no other or greater rights than his.
3. Insufficiency of the authentic evidence on which the order issued is no ground for injunction; the remedy is by appeal.
4. Inability to furnish a suspensive appeal bond furnishes no title to relief by injunction.

APPEAL from the Eleventh District Court, Parish of St. Landry. *Perrault, J.*

E. North Cullom for Appellant.

Estillette & Dupré for Appellee.

The opinion of the court was delivered by

FENNER, J. The plaintiff in the first case, as holder of mortgage notes of W. H. Anderson, deceased, took out executory proceedings thereon against defendant, his widow and sole universal legatee, and obtained an order of seizure and sale of the mortgaged property.

Thereupon the defendant instituted the second suit to restrain by injunction the sale of the property.

Art. 739, Code of Practice, provides: "The debtor can only arrest (by injunction) the sale of the thing thus seized by alleging some of the following reasons, to-wit:" and it proceeds to enumerate specifically eight grounds.

It is admitted that the petition for injunction in this case alleges not one of these grounds, and indeed the party admits that her injunction is not based on Art. 739, but on Art. 296 of the Code of Practice, which is the general article declaring that "injunction or prohibition is a mandate obtained from a court by a plaintiff, prohibiting one from doing an act which he contends may be injurious to him or impair a right which he claims." This is a mere definition of injunction, and it is impossible that it should derogate from the

prohibition contained in Art. 789, which confines the power of arresting the execution of orders of seizure and sale by injunction to the specific cases therein enumerated, and, by clear implication, prohibits that remedy in any other case.

The contention that Art. 739 only applies to "the debtor," and that the defendant here is not the "debtor," is without force. Mrs. Anderson is the legal representative of the debtor, stands in his shoes, and can have no rights except his rights.

Equally meritless is the contention that the article only applies to injunctions without bond. The language applies to all injunctions, and denies that remedy, except in the specified cases, and the fact that in subsequent articles bond is dispensed with in those cases, does not authorize injunctions in other cases, even with bond.

The particular ground upon which the injunction is rested is that the order of seizure and sale issued without production of the complete authentic evidence required by law. It has been repeatedly and distinctly held that this affords no ground for injunction in any case, but that the remedy is by appeal. Durae vs. Ferrari, 25 An. 80; Shreveport vs. Flournoy, 26 An. 709.

The plea that defendant should be granted relief by injunction because she was unable to furnish a suspensive appeal bond is surely untenable. If recognized, the remedy of suspensive appeal would be substituted in many cases by injunctions. It should seem that the fact that the law only allows an appeal to suspend execution of a judgment when the ample bond required in such cases is furnished would be the strongest argument against allowing the same purpose to be accomplished by an injunction issued on a comparatively insignificant bond.

Judgment affirmed.

No. 1455.

ANTENOR BERNARD ET AL. VS. EDOUARD NOEL.

Where a wife who has made a donation *inter vivos* of all her property to her husband without reserving anything in the act for her subsistence, dies without having either revoked or attacked the donation as being violative of Art. 1497 of the Civil Code, the right of attack does not pass to her collateral heirs but dies with her.

APPEAL from the Seventeenth District Court, Parish of Vermilion. *Allen, J.*

45 1135
52 891
52 1160
45 1135
113 824
d113 829
45 1135
117 845
45 1136
e117 874
45 1135
121 348
45 1135
123 479
f123 481

L. L. Bourges for Plaintiff and Appellant.

C. DeBaillon and *Lastie Broussard* for Defendant and Appellee.

The opinion of the court was delivered by

NICHOLLS, C. J. Plaintiffs seek to annul a donation of certain property made by Francoise Marie Nezat to her husband, upon the ground that the donation was in violation of Art. 1497 of the Civil Code, which declares that the donor shall in no case divest the donor of all his property—he must reserve to himself enough for subsistence; if he does not, the donation is null for the whole.

The wife died some time in the year 1892, without having attempted to invoke the nullity of that act.

She left no descendants nor ascendants, and no question of an interference with the rights of forced heirs is involved in this case.

The plaintiffs base their rights upon being the collateral heirs of the donor.

Defendant excepted that plaintiffs' petition disclosed no cause of action. This exception was sustained, the suit dismissed and plaintiffs have appealed.

Plaintiffs' allegations as to the donation are that on the 20th day of September, 1880, the said Marie Francoise Nezat passed an act of donation *inter vivos* to Edouard Noel without reserving anything for her subsistence.

For the purposes of this exception we must assume as true that the property donated was the whole of donor's property, and that the act of donation was passed without reserving anything for her subsistence.

The donor and donee were husband and wife. The donation was not made to a stranger, but to one who under the law was bound to support her (C. C. 119-120), and who, as no complaint was ever made to the contrary, we must presume complied with his obligations. The use, fruits and revenues of the property donated enured to the benefit of the community in which the wife was a partner, and contributed to her subsistence. (C. C. 2402.) Again, donations between married persons during marriage, though termed *inter vivos*, are always revocable, thus differing essentially from donations *inter vivos* in a strict sense, as the latter are by law, when once accepted,

irrevocable. A revocation of the donation by the wife to her husband may be made at any time by her without her being authorized to that effect by her husband or by a court of justice. C. C. 1749.

In the case at bar the act of donation received full effect up to the dissolution of the marriage by death. The wife had the legal right to have revoked the donation and to have left the whole of the property to her husband by will had she so desired, without the possibility of complaint from the plaintiff, who had no vested right, absolute or contingent, on it.

The nullity declared by Art. 1497 of the Civil Code is absolute only relatively to the particular persons for whose special interest it was passed, and among these can not be classed her collateral heirs invoking it when she had not done so herself. See Scott vs. Briscoe, 37 An. 178.

In the case at bar the right to invoke the nullity was a personal one in the sense that when she died the right to revoke the act died also. To discover the true meaning of a law we must often consider the reason and spirit of it, the cause which induced the Legislature to enact it and the mischief which it sought to prevent or to remedy. However general may be the terms in which it is couched, it only extends to those things or persons it appears the Legislature intended it to reach and apply to. The law in question in its enactment did not have in view collateral heirs, and it certainly was not passed for their benefit.

The possible interest which such heirs might set up in donation between two spouses was too remote and contingent, in our opinion, to have been attempted to have been safeguarded by the law-maker through this article of the code.

For the reasons herein assigned the judgment of the District Court is hereby affirmed.

No. 1264.

THE STATE OF LOUISIANA VS. KID NASH AND KID BARNETT.

1. It is settled law in this State that rulings of the trial judge on questions not submitted to the jury, but to the judge alone, and involving blended issues of law and fact, are reviewable in this court, on the facts as well as on the law provided the testimony has been reduced to writing and embodied in, or attached to, the bill of exceptions taken to the ruling.

72

45 1137
45 1166

45 1137
46 196

45 1137
47 1011

45 1137
49 356

45 1137
50 1073
50 1139
51 166

45 1137
52 494

45 1137
f117 388
117 389

45 1137
121 1053

45 1137
124 754
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2. To entitle an accused, as matter of right, to new trial, on the ground of nonage of a juror, he must prove affirmatively three facts, viz.: (1) the fact of nonage; (2) that this fact was unknown to accused or his counsel until after verdict; (3) that the juror was questioned as to his age on his *voir dire*, and falsely answered that he was of the age required by law.
3. The accused have the constitutional right to a trial by jury, by a jury of twelve men possessing the qualifications required by law, and when they show, by proof of the above facts, that they have been deprived of this right, notwithstanding the exercise of all due diligence to secure it, and by deception, they are entitled to relief, even after verdict.
4. The evidence in this case was reduced to writing, and is regularly brought up as part of the bill of exceptions taken to the judge's ruling refusing the new trial. There is no dispute as to actual nonage of the juror and as to its discovery only after verdict, and the evidence of ten unimpeached witnesses who swear that they heard the juror questioned as to his age and his answer that he was twenty-two years old, can not be overcome or even shaken by the negative testimony of five witnesses who say they did not hear the question or answer though admitting the possibility that it might have been asked and answered and not heard, or, if heard, forgotten by them.

APPEAL from the First District Court, Parish of Caddo.

J. R. Land and *H. B. Lichtenstein* for the State, Appellee.

M. C. Elstner and *A. L. Kahn* for Defendants and Appellants.

The opinion of the court was delivered by

McENERY, J. The defendants were indicted jointly for murder, tried and convicted, and separate verdicts as to each returned by the jury, Nash guilty as charged, and Barnett guilty as charged without capital punishment. They were sentenced in accordance with the verdict, and appealed from the judgment.

Their defences are as follows:

I.

To the ruling of the court in setting the case for trial.

II.

To the ruling of the court in refusing motion for continuance.

III.

To the ruling of the court in refusing to let the witness, T. W. Tusten, testify before the jury as to the general reputation of the deceased, McCort, at Monroe, La.

IV.

To the ruling of the court in refusing to let P. W. Perry, one of the jury, testify on the motion for new trial; the said Perry having been offered as a witness by defendants to prove that when offered as a juror he was asked as to his age, and that he answered that he was twenty-two years of age.

V.

To the ruling of the court in overruling motion for new trial.

VI.

To the ruling of the court in overruling the motion in arrest of judgment.

Exceptions 1 and 2 are controlled by the same principle and will be discussed together, as is done in defendants' brief.

The rule of the District Court before which the defendants were tried is that the District Attorney has the exclusive right to fix cases, except where sufficient time is not allowed the defendant to secure his witnesses.

On the 22d day of April, 1893, the first day on which cases on the calendar of the court were called under the rules for the purpose of being set down for trial, the District Attorney proposed and offered to fix the case of defendants for trial on the 25th of April following. The defendants objected on the ground that two important witnesses, residing in another State, would be present if the case was fixed at a later date; that there was not sufficient time to obtain their voluntary attendance, which was assured at a later period, and defendants had not the time to communicate with them and secure their promised voluntary attendance.

The fixing of cases for trial by the court is a matter relating to its discipline, and, as we have often said, we will not interfere with this discipline unless a manifest wrong has been inflicted upon the defendants. From the statement of the trial judge we are satisfied that no such wrong has been inflicted upon the defendants. He says the absent witnesses were non-residents and could not be forced to appear by any process of his court.

It would be a most unusual proceeding to continue a case for the purpose of allowing the defendants to communicate with absent witnesses to ascertain if their voluntary attendance could be obtained. Defendants in criminal cases could multiply absent witnesses at each

succeeding term and impose upon the indulgence of the court, and thus indefinitely postpone the trial. But this is a matter, when the witnesses are beyond the jurisdiction of the court, for the exercise of discretion by the trial judge. There is no legal right for a case to be postponed on such a showing, and a refusal to grant the delay, even in a meritorious case, would not authorize us to review the discretion exercised by the trial judge.

He says the witnesses lived at points in Texas, from which they could reach the court in twenty-four hours, and that they could be reached by telegraph.

The defendants, as a matter of right, were not entitled to the delay, and we think the trial judge was fully justified in refusing to allow the delay, in the exercise of a discretion which, in such a case, was exclusively his, on the showing made by the defendants.

For the reasons alleged in their protest defendants filed a motion for a continuance on the ground of the absence of these two alleged important witnesses. The reasons above stated will apply to the refusal to grant the continuance on account of the absence of these witnesses.

In the same motion it is alleged as a ground also for a continuance that two witnesses, who reside in Shreveport, material and important, were absent from said city, and that defendants had placed their names with the clerk of the court for the purpose of having them summoned. The facts which they expected to prove by said witnesses are detailed at length. Crisp, one of the witnesses, was in court during the trial and he was not placed on the stand. The trial judge stated this from his personal knowledge.

In respect to the facts expected to be proved by Bernstein, the absent witness, the trial judge states that his testimony would be only cumulative; that several witnesses testified to the overt act of deceased, that he did make threats against the life of the accused Nash, and that he and his co-defendant were informed of these threats. But the evidence showed, to the satisfaction of the jury, that the deceased made no effort to carry these threats into execution. On this point the evidence was conflicting, but the trial judge says the jury rejected the testimony of an overt act by the deceased and accepted that of the witnesses who testified to the fact that the "deceased was facing the bar counter, with his left side toward the front door of the saloon, when the accused entered by that door, and

that immediately upon their entrance two pistol shots were fired by them, or one of them, at deceased, and that they saw no pistol in deceased's hands, and no attempt by him to draw one." These observations on the testimony, the trial judge says, are made for the purpose of showing that if he erred in refusing a continuance no injury was done the defendants, as they had through other witnesses and their own testimony the advantage which Bernstein's testimony would have given them.

But we are of the opinion that the accused did not show due diligence in endeavoring to procure the attendance of Bernstein. On January 24, 1893, on motion of defendants, the case was continued. They had from this time on to the trial, to secure by legal process the attendance of Bernstein.

3. T. W. Tusten, a witness for the defence, was offered to prove the reputation of the deceased in Monroe, La., for being a dangerous and quarrelsome man, one who would likely carry his threats into execution. His testimony was rejected on the ground that it was not an effort to prove his character, where the deceased and accused resided, which would be a presumption that the accused knew his character.

To give the reputation of the deceased in evidence, which he bore in a distant community, it is necessary to show at least that the accused were aware of his character in said community. No attempt was made to show that the defendants knew the character deceased bore in the city of Monroe. Besides, the proof of some attempt on the part of deceased to commit an overt act against accused must be first shown as a foundation for such evidence.

4. P. W. Perry, a member of the jury, was placed on the witness stand by defendants to prove that when offered as a juror he was asked as to his age and answered that he was 22 years of age, when he was in fact only 20, and therefore an incompetent juror. The judge refused to admit his statement as a witness.

It is true that the evidence sought to be elicited from the witness was not to impeach the verdict, but we are of the opinion that the same rule will apply in rejecting such testimony as prevents the testimony of a juror to impeach the verdict rendered by him.

In case of State vs. Price, 37 An. 217, we said: The rule is of universal acceptance that jurymen will not be permitted to impeach their own verdict and thus declare their own perjury, for one oath

would but offset the other. Both public decency and public policy alike demand the rejection of such testimony. In the instant case the juror's oath, on the trial of the motion for a new trial, would be offset by his oath on his *voir dire*.

5. Evidence was introduced to show that the juror Perry was an incompetent juror, not having attained his majority. If the defendants had interrogated the juror Perry on his *voir dire* as to his age and he had deceived them by stating he was a major, this would be evidence of due diligence on part of defendants. If they had not so interrogated him, this would be a lack of diligence and a waiver of the cause of challenge. Thompson & Merriman on Juries, Sec. 302 *et seq.*; State vs. Garig, 43 An. 365.

If the fact had been shown conclusively on the trial of the motion that the witness had been questioned as to his age, then testimony could be heard as to his age, and if the fact of minority was proven, the defendants would be entitled to a new trial.

The testimony is conflicting as to whether the juror had been interrogated as to his age.

The presumption is in favor of the juror's competency, after he has been sworn and impaneled. To rebut this presumption the evidence must be strong and convincing. The trial judge believed that the question as to age had not been asked the juror, and he therefore overruled the motion for a new trial.

The trial judge says in his written opinion: "It can not be denied that defendants have, in the language of Bishop, failed to make it very distinct that the juror Perry was questioned as to his age before he was accepted.

"It is not necessary to go into any examination of the evidence. It is admitted to be contradictory, and the admission might have gone to the extent of conceding that it is flatly contradictory in some vital points—so contradictory, in fact, that no one can read it and be free of a reasonable doubt on the subject. It was the duty of defendants to remove these doubts, and as they have failed to do so, their application for a new trial must be denied."

We can add nothing to the force of this statement. A disputed fact was submitted to him, and he has found the fact, and we will not, in a motion for a new trial in a criminal case, disturb his ruling in such a case.

The other matters in the motion have already been disposed of.

6. The motion in arrest of judgment assigns as a ground therefor the nonage of the juror Perry. This fact does not appear upon the face of the record. It also assigns as a reason for arresting the judgment the fact that one of the defendants was found guilty as charged, and the other guilty as charged without capital punishment.

They were jointly tried. The jury could have acquitted one and convicted the other. There is no reason why a qualified verdict could not be returned as to one, and an unqualified verdict as to the other.

The law authorizes such a verdict.

7. Two jurors were challenged for cause by defendants, which was merited. They were then peremptorily challenged. They did not serve on the jury, and the defendants have no cause to complain. 35 An. 317; 35 An. 327; 37 An. 77; 36 An. 206; 37 An. 768.

Judgment affirmed.

ON REHEARING.

FENNER, J. This case has been transferred from the Monroe term to this term for decision under an application for rehearing.

The only point in our original opinion which demands reconsideration is the one based on the nonage of the juror Perry, who served on the jury and participated in the verdict.

This point is presented on a motion for new trial in the following terms: "That one of the jurors that composed the panel that tried the case against the defendants, P. W. Perry, was not a competent and qualified juror under the laws of Louisiana, for the reason that he was under twenty-one years of age, and not a qualified elector at the time of said trial and at the time he was taken on said jury; that they, through their counsel, used all due diligence in their efforts to secure jurors competent and qualified; that one of their counsel asked the said juror, Perry, his age, and the said juror answered he was twenty-two years old; that said answer was untrue, misleading and a fraud upon defendants, and that by said answer he caused himself to be taken on said jury; that they had no knowledge of said juror's disqualification and incompetency at the time he was tendered and accepted by them, and until after the trial of said case had been concluded and the verdict rendered and the jury discharged." The facts thus alleged were verified by the affidavit of both the accused and of their counsel.

The motion was set down for trial, and evidence was taken contradictorily between the parties, which evidence was reduced to writing. When the judge overruled the motion for new trial a bill of exceptions was duly taken to his ruling, and the evidence was attached to and made a part of the bill.

In this State it has been held in a long series of decisions that rulings of the judge made in the course of the trial, or on motions for new trial, on questions submitted to the judge alone and involving blended issues of law and fact, are reviewable in this court on the facts as well as the law, provided the testimony be reduced to writing and embodied in or attached to the bill of exceptions taken to the ruling.

The leading cases on this point are State vs. Nelson, 32 An. 842, and State vs. Seiley, 43 An. 143, in the last of which the whole subject was reviewed and the doctrine not only reaffirmed but extended (over a dissenting opinion) so as to authorize the parties to demand the reduction to writing of the testimony taken in such cases and to make a refusal of the judge to do so reversible error.

But the general doctrine has been announced in a multitude of cases: 32 An. 819, 854, 1052, 1086; 34 An. 69, 149, 881; 35 An. 770, 823; 36 An. 87, 158, 920; 37 An. 780, 172, 443; 38 An. 539, 581, 660, 684; 39 An. 319, 862, 919; 40 An. 75, 740; 41 An. 143; 42 An. 83.

It is no longer open to discussion, and it imposes on this court the power and duty to review the findings of the judge in this case not only on the law, but on the facts as exhibited by the testimony, with which the questions of law are inseparably blended.

We consider that, for the maintenance of their motion for new trial on this point, it was essential that defendants should prove all of three facts, viz.: (1) That the juror, Perry, was under the age of twenty-one; (2) that this fact was unknown to the defendants and their counsel until after verdict; (3) that the juror was questioned as to his age on his *voir dire* and answered that he was of the age required by law.

The sufficiency of the proof on the first two points was conceded by the judge *a quo*, and we find no ground for questioning it.

The learned judge, with his usual directness and perspicuity, says: "The pivotal point is, did the defendants examine the juror as to his age, and were they misled by his answers? This is purely a question of fact to be decided on the evidence adduced. If the

juror was in fact interrogated as to his age and answered falsely, and defendants were induced by such false answers to accept him on the panel, they are entitled to a new trial although the juror may have been honest and conscientious in his belief and free from any intent to deceive. On the other hand, if the question was not asked and the false information not voluntarily given by the juror, it is too late, after verdict, to object on the ground of nonage." We think this statement absolutely correct and fully sustained by authority. We affirmed it in our original opinion herein, saying: "If the defendants had interrogated the juror Perry on his *voir dire* as to his age and he had deceived them by stating he was a major, this would be evidence of due diligence on their part. If they had not so interrogated him, this would be a lack of diligence and a waiver of the cause of challenge. Thompson and Merriman, Jury Trials, Secs. 302 *et seq.;* State vs. Garig, 43 An. 355."

This court has decided the precise points, saying: "An opportunity is afforded the prisoner of inquiring into the qualifications of the juror on the *voir dire* examination. If, upon that inquiry, he be found to want the legal qualifications, he may be set aside for that cause. It would have been different if the juror, when interrogated, had stated that he had acquired the requisite residence, was free from bias, or that he possessed any other legal qualification, and it had been subsequently discovered that the statement was false. This would have been a fraud upon the prisoner, from which he could have been relieved." State vs. Kennedy, 8 Rob. 596.

We have been at pains to make quite an extensive examination of the authorities bearing on this subject, and while we discover some conflict of opinion on the question whether the incompetency of a juror, though discovered only after verdict, will be ground for new trial in absence of due diligence in testing his qualifications by proper inquiries during the examination on the *voir dire*, we find no authority holding or suggesting that the new trial can be denied when the party has exercised full diligence in questioning the juror on his *voir dire* and has been misled and deceived into accepting an incompetent juror by his own answers, avowing his competency, which are subsequently discovered to be false. We do not believe such a precedent exists or will ever be made.

The learned trial judge, however, while affirming the above principle, bases his refusal of the new trial on the ground that the evi-

dence does not establish, with sufficient certainty, the pivotal fact that defendants did question the juror on his *voir dire* as to his age and did receive a false answer.

He quotes the following observation of Mr. Bishop in his work on Criminal Procedure, Vol. 1, Sec. —: "But if, through undiscoverable and unknown wrong, the defendant has been tried and convicted by a panel containing an unfit juror, the evidence of which must be very distinct where the verdict is right, a new trial will be granted." He then proceeds to state his opinion that the verdict in this case is right, and that the defendants suffered no practical injury from the fact of the juror's nonage, and then continues: "These observations of Bishop do not affect the right of defendants to a new trial where the evidence distinctly shows that they were misled by incorrect answers touching a juror's age, given before he is accepted and sworn. But they distinctly recognize the rule that the burden of proving that the preliminary examination was held is on the defendants, and the proof must be very distinct and clear where the verdict is right. A mere numerical preponderance of witnesses or a reasonable doubt whether the preliminary examination was or was not had is insufficient. The fact must be established with such a degree of distinct certainty as leaves no reasonable doubt of its existence. If there remains a reasonable doubt of its existence, such doubt can not enure to the benefit of the accused. On the contrary, it enures to the benefit of the verdict, where the latter is fully justified by the law and the evidence."

It must be admitted that the above is a very strong statement of the weight of the burden of proof carried by defendant; but while the language employed is perhaps a little too strenuous, we are disposed to approve the statement of the rule, with some moderation of its terms, as substantially correct.

The judge proceeds: "Testing the application of this rule, it can not be denied that defendants have failed, in the language of Bishop, to make it very distinct that the juror Perry was questioned as to his age before he was accepted. It is not necessary to go into an examination of the evidence. It is admitted to be contradictory in some vital points—so contradictory, in fact, that no one can read it and be free of a reasonable doubt on the subject. It was the duty of defendants to remove such doubt, and as they have failed to do so, their application for a new trial must be denied."

Influenced by these persuasive statements of the district judge, by our great respect for his rulings and indisposition to disturb them, we affirmed them in our original opinion without criticising the testimony very closely.

The application for rehearing emphasizes the solemnity of our duty, in a case involving the life of one and the liberty of the other defendant, to review the testimony on the point involved and to determine whether or not it has been correctly weighed by the district judge, and sustains his conclusion that it leaves the fact in controversy subject to reasonable doubt. This duty we could not evade without ignoring the tenor of the constant jurisprudence of this court as settled by the numerous decisions above quoted.

We have now read again and re-read the evidence, and if any fact can be established by human testimony, we can not avoid the conclusion that the testimony in this case clearly establishes that the juror Perry was questioned on his *voir dire* as to his age, and that he did answer that he was 22 years of age.

Ten witnesses positively swear that they heard the question asked and the answer made. We name them because several of them are known to members of this court as honorable and creditable persons, and none of them are in any way impeached. They are M. C. Elstner, A. L. Kahn (the two counsel of defendants), W. M. D. Cawthon, T. T. Land, Jr., H. C. Rogers, C. W. Crane, S. Kahn, D. March, A. Holt and Frank Looney. Our late respected clerk, W. G. Boney, also testifies that he heard some juror questioned as to his age who answered that he was 22 years old, but could not say whether or not it was the juror Perry.

Against this positive testimony the State brings five witnesses, all of whom state that they were paying attention to the examination and to the questions and answers, and that they heard no such question to Perry or answer by him. One of them, M. L. Scovell, says: "I am positive the question as to his age was not asked; but there is a possibility that it was asked and I might not have heard it." Another, N. W. Buckalew, says: "I will not swear that I heard all the questions asked him." Another, J. H. Jordan, says: "I do not think the question was asked, but it possibly was." Another, J. H. Prescott, says: "I will not say it was impossible," etc., and again, if the question was asked, "I would have heard it, as I heard everything; but possibly it passed from my memory."

The last, John L. Hodges, simply swears that he did not hear the question asked; that he was paying pretty close attention and that to the best of his knowledge and belief it was not asked.

This is a fair statment of the whole testimony found in the record, with the exception of some conflicting evidence about certain statements made by one of the counsel, which has no substantial bearing on the question. On this evidence we are bound to determine whether the defendants have discharged the burden of proof devolving on them. If they have not, how could it be done? If ten unimpeached witnesses positively testifying to a fact evidenced by their own senses are not sufficient, what number would suffice? If the testimony of five persons who did not hear, or do not remember to have heard, a question asked and answered can overthrow or even shake the testimony of ten persons who positively swear that they heard the question and answer, how could such a fact be established in any case? A case of the kind could hardly arise in which witnesses could not be found who did not hear or remember the question and answer. The question as to a juror's age is not one ordinarily calculated to attract anyone's attention, or to fix itself on the memory. The question and answer may have been made and yet the witnesses of the State may be absolutely truthful in their statements. But if the question and answer did not occur, the ten witnesses who swear positively that they heard them are undoubtedly perjurers. As we said in another case, "the assertion of a fact which has never had existence can not be consistent with truth, whereas the denial of a fact which has existence may, without violating truth, be the result of inattention or defective memory. Hence the rule that positive testimony on a given point must always predominate over negative testimony on the same point." Story vs. Ins. Co., 37 An. 258; Guesnard vs. Bird, 33 An. 799.

In this case we do not think it to be a mere question of predomination of evidence. We consider that there is no conflict whatever in the evidence. It leaves no doubt on our minds, reasonable or unreasonable. Unless the ten witnesses of defendants are wilful and conscious perjurers, the defendant's case is so clearly established that "the probation bears no hinge or loop to hang a doubt on."

The defendants unquestionably had the constitutional right to a trial by jury—by the historical jury of twelve men possessing the

qualifications required by law—*legales et liberi homines*—which unquestionably exclude aliens and minors. They have exercised all due diligence to secure the enjoyment of this right, and have done nothing and omitted nothing which disables them from asserting it, in the manner and at the time when they have done so. Whether guilty or innocent, they are entitled to the protection of the Constitution. Unless found guilty by due process of law, conducted according to legal and constitutional requirements, the judicial power has no more right to condemn to death the blackest criminal than it has to visit like penalty on the whitest innocent.

However much we may regret the necessity of setting aside a verdict approved as right by the trial judge, our duty under the law and on our official oaths leaves us no other alternative.

It is therefore ordered that our former decree herein be annulled.

It is now adjudged and decreed that the sentences appealed from be avoided and reversed, that the verdict be set aside, and that the case be remanded to the lower court for a new trial according to law.

CASES

ARGUED AND DETERMINED IN THE

SUPREME COURT OF LOUISIANA,

AT SHREVEPORT,

IN

OCTOBER, 1893.

JUDGES OF THE COURT:

HON. FRANCIS T. NICHOLLS, *Chief Justice.*

HON. LYNN B. WATKINS,
HON. SAMUEL D. McENERY,
HON. JOSEPH A. BREAUX,
*HON. CHARLES PARLANGE,
} *Associate Justices.*

*Appointed on the 4th of October, 1893.

No. 355.

STATE OF LOUISIANA VS. BEN DEPASS ET ALS.

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The transcript of appeal in this case is so flagrantly defective that it can not be dealt with as a judicial record. The judgment and the verdict upon which it was based can not stand on such a record and must be set aside, and the defendants be detained in custody for further proceedings.

APPEAL from the Seventeenth District Court, Parish of St. Mary. *Allen, J.*

John R. Land, District Attorney, for the State, Appellee.

D. Caffrey & Son for Defendants and Appellants.

The opinion of the court was delivered by

NICHOLLS, C. J. The defendants, Ben Depass, James Depass and Alexander Landry, Jr., were jointly indicted for the murder of Alfred Edwards, and upon trial by jury Ben and James Depass were found guilty as charged, without capital punishment, and Alexander Landry was acquitted.

Ben Depass and James Depass have appealed from the sentence against them, and rely for the reversal of the judgment of the lower court upon objections urged in a bill of exceptions reserved in that court and upon an assignment of error in the Supreme Court.

The bill of exceptions was as follows:

BILL OF EXCEPTIONS.

1. "The defendants placed upon the stand Alexander Landry, Sr. a witness, to prove that shortly before the fatal meeting between the accused and Alfred Edwards, the deceased, the said deceased was heard to utter threats against the lives of defendants, which threats were not communicated to defendants. The defendants having previously placed upon the stand Aaron Johnson, Henry Carlin, Ben Depass and Alexander Landry, Jr., to prove that Ben Depass, who fired the fatal shot, only fired after a demonstration made against him by the deceased, which demonstration consisted in the drawing of a pistol and the pointing of it at Ben Depass, and said witnesses having sworn to such a statement of facts, the evidence of uncommunicated threats, aforesaid, was sought to be introduced in support of the plea of self-defence, and not for the purpose of showing the *quo animo* of the defendants, but for the sole purpose of showing that the deceased sought the meeting, or began or provoked the combat, and to show the animus of the deceased and to illustrate his conduct and motives. The testimony of the four above mentioned witnesses showed that the acts of the deceased at the time of the encounter that resulted in death were at least of a doubtful character, and defendants offered to introduce the said evidence of uncommunicated threats for the sole purpose stated, and disclaimed any other purpose."

The State objected to the introduction of this evidence, and the court sustained the objection for the following reasons:

"The evidence of uncommunicated threats sought to be introduced in this case was rejected on the objection of the district attorney,

because the proof in the case, even the testimony of the witnesses mentioned in this bill of exceptions, three of whom were prosecuted for the murder of Edwards, and the other, Aaron Johnson, was arrested for the same offence, left no doubt of the fact that the defendants were the aggressors, and it shows that they made the attack that resulted in the death of Edwards.

"The facts that led up to the homicide are the following: Three hours before the homicide, Jim Depass and Alexander Landry, two of the men charged with murder in the indictment, were beating another man. Edwards parted them and said it was not right for two to jump on one. This ended the difficulty and Edwards went off. Afterward Jim Depass met his brother, Ben Depass, and had some conversation with him. Ben Depass then went to a store and bought some cartridges and loaded his pistol with them.

"Three hours afterward Ben Depass, Jim Depass, Alexander Landry, Henry Carlin, the cousin of the defendants, and Aaron Johnson assembled at a point near the railroad depot. As Edwards passed he saw them and stopped, and said 'Good evening, gentlemen.' They responded, and for several minutes they conversed quietly together. During this conversation one of the Depass boys said to Edwards: 'That little seven-shooter of yours is no account.' Edwards answered: 'It is not a seven-shooter, but a good five-shooter.' He took it out and showed it to them, and then put it back in his pocket.

"The conversation continued with no reference to a difficulty. A short while afterward, while Edwards was leaning up against a post with his side toward the Depass boys, and not looking at them, Jim Depass suddenly struck Edwards on the head with a large rock, which staggered him and made him reel about in a dazed condition. While in this condition, Ben Depass shot and killed him. While Edwards was reeling and staggering from the blow on the head made with the rock, he attempted to draw his pistol, and did get it out before Ben Depass killed him. Ben Depass and Aaron Johnson said that Edwards pointed it at him. No other witnesses bear him out in this. All the disinterested witnesses, and there were several, say that Edwards was shot down while in the act of drawing and while he was dazed and staggering from the rock blow.

"The evidence indicated a preconcerted design on the part of Ed-

wards' slayers, and shows conclusively that they made an uprovoked attack upon him and killed him."

Defendant in this court urges that the ruling of the district judge upon the subject of uncommunicated threats was erroneous, claiming that "proof of uncommunicated threats is admissible where the question is as to what was deceased's attitude at the time of the fatal encounter or where it appears that other evidence has been introduced tending to show that the act of homicide was committed in self-defence." Wharton on Criminal Law, Sec. 1027, and 93 U. S. Rep., p. 465. He contends that the present case was brought under the operation of that rule. We do not think so. Taking the recital of the district judge as to the testimony adduced (which was not taken down in writing) as correct, we do not see what applicability the rule invoked has to the case at bar, and the court under the state of facts shown could not do otherwise than act as it did.

Taking the testimony as a whole and considering it we do not think it can be said there was testimony legally tending to show a case of self-defence.

The accused assigned for error in this court the following irregularities in the proceedings of the court as being shown by the transcript:

"That the bill of indictment on which defendants were tried was not found by a grand jury regularly organized, nor was it ever properly found and presented by such grand jury in open court."

We have examined what purports to be a record of the proceedings of this case. On the last page we find a certificate signed by J. B. Verdun, Jr., deputy clerk of the Seventeenth Judicial District Court, parish of St. Mary, to the effect that "the foregoing twenty pages contain a true and correct transcript of all the proceedings had, evidence adduced and documents filed in the suit of the State of Louisiana vs. Ben Depass et als., No. 569 of the criminal docket of the Seventeenth Judicial District Court." The transcript fails to show the opening of that court either on the first or any other day of the term; it fails to show that a grand jury was ever empaneled or sworn, or that any appointment of foreman was made, and it is throughout so flagrantly defective as to make it difficult to be dealt with as a judicial record at all. We see from it that a judgment has been rendered against these appellants sentencing them to the penitentiary for life. This judgment and the verdict upon which it was

based can not stand on such a record. State vs. Shields, 33 An. 993.

For the reasons assigned it is ordered, adjudged and decreed that the judgment appealed from and the verdict upon which it was based be set aside, and that the said judgment be annulled and reversed, and that defendants be detained in custody subject to the order of the District Court of the parish of St. Mary to await further prosecution or proceedings according to law.

No. 370.

STATE OF LOUISIANA VS. JIM MACK.

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Counsel assisting the district attorney has the right to open and close the argument.

The State attorney should not say to the jury in his argument that he believed the accused to be guilty; but if the latter does not ask the judge to stop the argument, or to charge the jury to disregard the statement, he can not complain.

It is only in case of gross and unambiguous error that this court will review the charge to the jury, if no objections were made at the time of its delivery and no bill of exceptions taken to the same.

APPEAL from the Thirteenth District Court, Parish of East Feliciana. *Brame, J.*

John R. Land, District Attorney, for the State, Appellee.

W. F. Kernan for Defendant and Appellant.

The opinion of the court was delivered by

NICHOLLS, C. J. The defendant, having been indicted for murder, was on trial convicted of manslaughter and sentenced to the penitentiary for the period of seven years. He has appealed, relying upon the following grounds set up in a motion for a new trial, which was overruled:

1. That the court allowed assistant counsel for the State to close the argument.

2. That the court allowed the assisting counsel for the prosecution to state to the jury in the closing argument that he believed said accused to be guilty.

3. That the court erred in charging the jury that it was involuntary manslaughter "where in a scuffle to disarm a person a pistol or gun is accidentally discharged and kills a person."

On the first two grounds bills of exception were reserved, but the last objection was set up for the first time in the motion for a new trial, and no exception was taken to the adverse ruling upon this motion.

No objection is urged to the employment of an assisting counsel for the prosecution and no claim is made that the State was not entitled to the closing argument, but it is contended that this argument should have been made by the district attorney himself. Counsel for the accused in his brief says that "when the district attorney engages assisting counsel, it was held by this court in State vs. Anderson, 29 An. 774, the latter might open and close the argument, but that in the present case the assisting counsel was not employed by the district attorney. His appearance was by sufferance."

There is nothing in the record to show by whom this counsel was engaged or under what circumstances he took part in the proceedings. There is no evidence of the existence of the particular fact on the strength of which this case is sought to be taken from under the ruling in that of Anderson, and the decision in the latter determines adversely to the accused his first ground of complaint.

The second ground is thus stated by counsel in the bill of exceptions having relation to it: "On the trial of this case the assisting counsel for the prosecution stated in the closing argument that he believed the accused to be guilty, to which statement counsel for accused objected and excepted, and that the judge did not charge the jury to disregard said statement by said counsel."

Before signing the bill the district judge added: "The assistant counsel for prosecution immediately added that he believed the accused guilty from the evidence, and that the jury should go by the evidence and not by his opinion."

Counsel for the accused cite a number of decisions in support of his proposition that it is highly improper and unfair in a district attorney to declare to the jury that *he believes* the accused to be guilty, and that such a declaration warrants a new trial, among others that of People vs. Hess (Mich.), 48 N. W. Rep.; Raggio vs. People, 26 N. E. Rep.; Bery vs. The State, 10 Ga. 511, 522; Metchum vs. The State, 11 Ga. 615.

In State vs. Duck, 35 An. 764, this court said: "Accused charged error in the refusal of the district judge to stop the district attorney in the course of the latter's argument at the request of counsel for accused, charging that the district attorney was making an improper and unfair argument to the jury. There is no force in this complaint. This court can not and will not interfere with district judges in the manner of controlling their courts or of enforcing rules of propriety and decorum on the officers of the court.

That a district attorney should not throw the weight of his personal influence into the case which he is conducting as a public official by announcing his individual opinion and belief as to the guilt if an accused is undoubtedly true. In the case at bar the assistant counsel after making the statement that he believed the accused guilty, modified it immediately by saying "he believed him guilty under the evidence, and that the evidence should go by the evidence, and not by his opinion."

As so modified the private opinion of the counsel was still before the jury—and the expression was one which should not have been used. The bill of exception states that the accused excepted to it, and that the judge did not charge the jury to disregard said statement.

There was no demand made on the judge to stop the argument or to charge the jury to disregard the statement, and no refusal on his part to comply with any request made on him in respect to it. Had the accused desired any action on the part of the judge he should have asked it.

The remark does not seem to have been reiterated, and the verdict rendered would not indicate that it carried with it any influence on the jury.

The third ground, leveled at a sentence in the judge's charge, was set up for the first time after verdict. This court has repeatedly declared it to be the duty of the accused, at the time a charge is made, to make known any objections he might have to the end that the judge's notice may be drawn to them and enable him to either strike out, modify or enlarge the instructions. 25 An. 147; 29 An. 364; 30 An. 536; 39 An. 229; 34 An. 104; 35 An. 543; 37 An. 57; 38 An. 497.

Defendant's counsel cite State vs. Baird, 34 An. 104, and State vs. Curtis, 34 An. 1214, as cases in which we reviewed charges of a judge, although objections had not been made at the time of its delivery and no bill of exception had been reserved.

In the first of these cases we said: "We held in State vs. Ricks, 32 An. 1098, that where the charge was in writing and embodied in the record we would notice errors under proper assignment thereof, although not presented by bill of exceptions;" but we also further said that only in case of gross and unambiguous error would we do so.

There has been no assignment of error in this court, and reference has been made to the judge's charge only in the brief of defendant's counsel.

We may say, however, that we have examined it and we discover "no gross and unambiguous error" in it.

Counsel has selected one of its sentences and attacked it as being erroneous, because, as he says, "not directly and pertinently coupled" with another portion which the court actually gave to the jury, and by reason of that fact calculated to mislead. We do not think the jury was misled. The charge was obviously made in view of and with reference to the facts of the particular case, of which we have no knowledge, but which the court and jury had before them and understood.

It is not pretended that the charge as made was not applicable to and justified by the facts, nor that taken as a whole it misstates the law.

It is simply contended that the charge was inartificially drawn, and therefore liable to mislead. The charge did not apparently so impress the accused on the trial. If it did so impress him it was his duty to have seasonably called for an alteration of its form.

For the reasons herein assigned the judgment appealed from is hereby affirmed.

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No. 372.

STATE OF LOUISIANA VS. RICHARD BOSWELL.

1. Defendant in a criminal case is not entitled, as a matter of legal right, to offer testimony in rebuttal of testimony in rebuttal.
2. The fact that after the defendant had closed his case the State recalled some of its own witnesses and interrogated them as to matters which might have been relevantly and properly introduced originally as part of the State's evidence in chief, does not necessarily affix to that testimony the character of new and direct "cumulative" evidence in chief. In the case at bar the testimony was strictly in the line of rebuttal, and not going beyond rebuttal must fall as to its contradiction, under the rules governing testimony. The purpose of the testimony was to disprove, not to prove, and was not offered at that late stage of the proceedings to introduce against the accused an admission or

confession to establish his guilt. If accused feared that the jury would give to the rebutting evidence, legally introduced, an effect beyond its legitimate scope, his remedy lay in asking from the court special instructions on that subject and not in departing from the rules governing the practice in relation to that kind of testmony.

APPEAL from the Fifteenth District Court, Parish of East Baton Rouge. *Buckner, J.*

John R. Land, District Attorney, for the State, Appellee.

H. F. Brunot for Defendant and Appellant.

The opinion of the court was delivered by

NICHOLLS, C. J. The defendant, Richard Boswell, indicted for the murder of his wife, was tried by a jury, found guilty as charged and sentenced to be hung. He has appealed.

He urges that during the trial of the case and after the testimony of the defendant for the defendant, except for the right reserved to introduce rebuttal evidence was closed, the judge *a quo* improperly refused to permit the defendant to rebut certain evidence subsequently introduced by the State, which he claims to have been new evidence. He further urges that the court erred in overruling his motion for a new trial based upon the charge that the sheriff entered the jury room when the jury was deliberating upon a verdict in this case and called Juror Betz, who was in favor of a verdict of guilty without capital punishment, aside to a window out of the hearing of the other jurors and held an earnest conversation with said juror, which said juror immediately returned to the other jurors and voted and urged thereafter an unqualified verdict against defendant.

We will dispose of this last complaint by saying that every allegation made in the motion and every inference to be drawn from the same was affirmatively disproved by the testimony taken with the exception of that which stated that the sheriff who had the jury in charge had a conversation with the juror Betz.

The district judge correctly overruled the motion.

In signing the bill of exceptions which the counsel of accused reserved to his refusal to admit the testimony offered for the defence, the judge states the facts upon which his ruling was predicated, as follows:

"The accused was charged with the crime of murdering his wife. The State opened the case by introducing evidence to show accused's guilt. The accused was placed on the stand as a witness in his own behalf. He admitted the killing, but claimed it was an accident, the pistol going off accidentally, and only one shot was fired, which fatally wounded his wife. He testified that after his pistol went off he went to the front gate and threw the pistol away in a certain direction. He said he told his attorney about four days before his trial the direction he had thrown his pistol. His attorney, Mr. Brunot, with three other witnesses, testified that they had gone to the place designated by accused and found a pistol with one chamber empty. The pistol was exhibited to the jury, was identified by the accused as the one he shot his wife with, and it was shown that the pistol had been exposed to the dew, rain and sun for over four weeks before it had been found by Mr. Brunot and the three witnesses. The State then introduced witnesses to show that the accused after he had shot his wife placed the pistol with which he did the shooting on a table; that the pistol showed two chambers discharged. Alec Johnson swore he had taken the pistol from the table in accused's room and produced it before the jury, identifying it as aforesaid. There were a number of witnesses who corroboated the evidence of Johnson. After the State had closed in rebuttal, attorney for accused insisted on producing witnesses in rebuttal, which was objected to by the State, and the objection sustained."

The recitals of the bill of exception, as made by the accused, were as follows: During the trial of the cause and after the testimony for the defendant, except for the right reserved to introduce rebuttal evidence, was closed, the State's attorney offered a pistol in evidence, and proved by witness Aleck Franklin that said witness secured possession of said pistol at the house of defendant some days subsequent to the shooting with which defendant is charged, and that said witness had preserved said pistol to be produced and used on the trial as evidence. Said State's attorney also recalled witnesses Fannie Coleman, Chatty Taylor and Joe Johnson and proved by said witnesses that the said pistol, introduced at the time and as aforesaid, was lying upon a table near the bedside of deceased with two chambers of said pistol discharged when the said witnesses entered the room where deceased lay, shortly after the

shooting occurred, and that said pistol remained upon said table in open view for two or three days thereafter. The State's attorney also proved by witness Fannie Coleman that defendant admitted to said witness, when defendant's attention was called by said witness to said pistol on the morning after the shooting charged, that the said pistol was the weapon used by defendant, by said accused saying to said witness, "I don't want anything to do with it; it has done enough already." Neither this pistol nor this alleged admission, nor the testimony touching these matters, had been alluded to either directly or indirectly on the trial of the case prior to the announcement by counsel for the defence that the testimony for the defence was closed, except for rebuttal.

That said testimony uncontradicted and would do the defendant irreparable injury. That the said pistol and admission were new evidence introduced by the State upon a recall of the State's witnesses above named, and after the examination in chief for both the State and defendant had closed. Whereupon defendant offered witnesses to rebut the new evidence introduced as aforesaid, and was permitted to swear and interrogate one witness, Vick Williams, who testified that he was in the room and at the bedside of deceased early on the morning succeeding the night of the shooting, when the physician summoned to attend deceased first arrived. That witness arranged the physician's instruments on the table whereon the aforesaid witness testified the said witness was lying. That there was no pistol on said table or in said room. Defendant then offered eleven witnesses to corroborate said witness and to prove that no pistol was upon the table at the time stated or at any time subsequent to the shooting with which defendant is charged, and to prove the defendant made no admission as testified by witness Fannie Coleman to said witness or to any person. That the district attorney objected to the admission of this testimony, alleging that it was in the nature of sur-rebuttal evidence and not admissible under the law, which objection the court sustained by ruling that defendant's offering was inadmissible.

It will be seen from the above statements that the testimony offered by the State after the accused had closed his case was introduced without objection from the defendant either as to its character or as to the time at which it was presented.

The only contention made was that having been introduced, the

accused was entitled to rebut it, the claim being that it was new direct evidence in chief.

If in fact it was rebutting testimony, this court has held several times that parties were not entitled of right to introduce testimony for its rebuttal. State vs. Woods, 31 An. 267. State vs. Gonsoulin, 38 An. 459.

The district judge refers to that testimony as rebutting. The record itself is silent as to whether it was so specially offered or not, or whether the judge ordered it to be so restricted, but as the court mentions it as having been in rebuttal and there is nothing to show that the defence made any objection as having been offered for too broad a purpose or as being offered too late as direct evidence in chief, we must assume that it was TENDERED as in rebuttal. Whether it was really such is another question.

The fact that the testimony was elicited from witnesses of the State who had been once upon the stand and recalled—that it was upon new matters which might have been relevantly and properly introduced originally as part of the State's evidence in chief, does not necessarily determine that question, as the accused seems to think.

It appears that after the State had closed its case upon evidence deemed sufficient by the district attorney, the accused took the stand in his own behalf, giving his account and version of the killing. He admitted the killing of his wife, but claimed that it was accidental.

He stated that the pistol with which she was shot had gone off accidentally, and that only one shot—that which caused the fatal wound—was fired; that he had thrown this pistol outside of his gate at a certain place, and that he informed his counsel of that fact, and after a particular pistol was produced, with one chamber empty, he declared it to be the identical pistol to which he had referred. He then placed his counsel and several others upon the stand, who testified that they had gone to the place designated and found a pistol with one chamber empty.

A pistol with one chamber empty was exhibited as being that so found, and testimony was adduced to prove that it had been exposed to the weather for several weeks.

The accused considered the establishment of these particular facts necessary for the purpose of proving his innocence. When the defence closed its case the State deemed it important to disprove this

testimony as far as it could, and offered and was permitted without objection, as has been stated, to introduce another pistol with two chambers empty and testimony to show that it was THAT pistol and not the one which had been previously exhibited from which the fatal shot was fired, as had been sworn to by the accused.

For the purpose of disproving the testimony of the accused on that subject the State, after producing the second pistol, introduced a number of witnesses to show at what place after the killing of the deceased it was first seen, how long it had remained there, when it had been taken from that place, and where it had remained until produced; and witnesses having testified to the fact that that pistol was seen on a table in the room of the accused shortly after the wounding, and that it had remained there several days, the State undertook to show (according to defendant's statement of facts) by a particular witness that the accused had stated to him that he "did not want anything to do with it—it had done enough already."

A comparison of the testimony offered by the State with that offered by the accused will show that its object and purpose was simply to disprove the identity of the pistol which the accused produced as being that from which the shot was fired, as had been testified to. It was perfectly legitimate for that purpose, and no part of it was irrelevant to that issue or went beyond it. The very failure to object in any way to it shows that it was unobjectionable. Being strictly in the line of rebuttal, and not passing beyond rebuttal, it must fall as to its contradiction under the rules governing testimony offered in rebuttal of rebutting testimony.

The fact that for the purpose of disproving the identity of the first pistol the State had shown by testimony a statement by the accused tending to show an acknowledgment by him of the ownership and identity of the second pistol does not affix to that testimony the character of new and direct "criminative" evidence in chief, and does not show an attempt at that late stage of the proceeding to offer against the accused a confession or admission to prove his guilt. Its purpose was not to *prove*, but to *disprove*. If the accused feared that the jury would give to the rebutting evidence legally introduced an effect beyond its legitimate scope, his remedy lay in asking from the judge special instructions to the jury on the subject, and not in departing from the rules governing the practice in relation to that kind of testimony.

We are of the opinion that the district judge in refusing to permit the accused to introduce testimony in rebuttal of the State's rebutting testimony exercised a judicial discretion which we are not called upon to reverse.

For the reasons herein assigned the judgment appealed from is affirmed.

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No. 375.

THE STATE OF LOUISIANA VS. H. C. STEWART.

A jury commissioner having been sworn, and the oath having been lost, parol testimony as to the fact of the commissioner's having taken the oath is admissible in evidence.

The failure of the clerk of court to record the oath can not disqualify the commissioner. The fact of qualification is the test of the capacity of the commissioner to serve, and the failure of the clerk to reduce the oath to writing and to record the same can not defeat public justice by *interrupting* judicial proceedings.

The fact whether or not an overt act of hostility of deceased against defendant has been proved, preparatory to the introduction of evidence as to communicated threats or the dangerous character of deceased, is within the discretion of the trial judge.

Parties visiting the grand jury on business before them, when nothing is said or done in relation to defendant's case, can not prejudice the defendant, and he has no cause of complaint.

A person having knowledge of the commission of a crime has the right, without being summoned, to go before the grand jury and disclose his knowledge of the commission of said crime.

A juror who on his *voir dire* states that he would qualify his verdict in all capital cases is an incompetent juror to serve on a jury in a case where the defendant is charged with murder.

APPEAL from the Tenth District Court, Parish of Natchitoches. *Andrews, J.*

Phanor Breazeal, District Attorney, for the State, Appellant.

Pierson & Porter for Defendant and Appellee.

The opinion of the court was delivered by

MCENERY, J. The defendant was indicted for murder, tried, convicted of manslaughter and sentenced to hard labor. His motion in arrest of judgment was sustained and the State appealed.

The defendant relies upon the motions to quash the indictment, in

arrest of judgment, for a new trial, and several bills of exceptions to the rulings of the trial judge in the course of the trial.

The motion to quash the indictment assigns as reasons therefor that one member of the jury commissioners had not qualified by taking the required oath, and that if the commissioner had been drawn the oath had not been reduced to writing, subscribed and recorded. Testimony was heard on the trial of the motion and bill No. 1 is reserved to the ruling of the district judge in allowing the introduction of parol testimony to show that the jury commissioners had qualified. The oath of the commissioners could not be found among the records in the clerk's office, and it had not been recorded. The fact of the loss of the oath had been proved. The testimony shows conclusively that the commissioner had been sworn by the clerk. The clerk states that he reduced the oath to writing, and that it was signed by the commissioner.

The latter swears to the taking of the oath, but does not positively recollect having signed it.

He says: "I have no recollection of signing it, but do not distinctly recollect that I did not sign it."

Act 44 of 1877 does not require that the oath shall be reduced to writing and recorded. The evidence of the selection and appointment of the commissioner is required to be entered upon the minutes of the court, and the commissioner is required to take an oath before the drawing of the jury—that is, before he enters upon the discharge of his duty.

There can be no question as to the propriety of its being reduced to writing, subscribed by the commissioner and recorded. This is the duty of the clerk and it is imperative, although not expressed in positive terms in the act. But the clerk's omission can not work a public injury. The fact of the qualification of the commissioner is alone the test of his ability to serve. The omission of the clerk in permitting or allowing the disappearance of the record can not destroy the fact of the qualification of the commissioner.

On the proof of the loss of the oath, it was competent to prove by parol the fact of the commissioner having qualified. The trial judge very aptly says "to hold otherwise, an interregnum or suspension of power in any department of goverment could be brought about at any time by a careless custodian of public records."

Bill of exceptions 2. Tobe Leveart was presented as a juror and

was asked by the district attorney if he was opposed to capital punishment. He answered that he had no scruples to the infliction of capital punishment; that on proper evidence he would render a verdict that would inflict the death penalty. But in answer to questions propounded by the trial judge, who explained to him that he would have the right to qualify his verdict, he stated he "would always qualify his verdict, and would not hang any man if he could help it." The juror was peremptory challenged by the district attorney, which was sustained by the court. The juror was not competent. Section 1000 of the Revised Statutes, which authorizes a jury in capital cases to bring in a qualified verdict, "Guilty without capital punishment," was not enacted to satisfy the scruples of jurors in the infliction of capital punishment. It was intended, if extenuating circumstances justified it, to authorize the jury to qualify the verdict, being in this respect similar to the grade of the offence of murder in other jurisdictions, known as murder in the second degree. 11 An. 535, 685; 30 An. 367; 38 An. 480.

Bill No. 3. A witness was sworn for the defence and interrogated as to the turbulent and dangerous character of the deceased. From the statement of the trial judge it appears that no overt act had been committed by deceased against the defendant. Testimony had been introduced to show an overt act of hostility of deceased against defendant, but the trial judge believes that no such demonstration had been made. In this matter he is clothed with a sound legal discretion, and there is no reason assigned why we should disturb his ruling. State vs. Ford, 37 An. 461; State vs. Nash and Barnett, 45 An. —, recently decided.

The testimony shows that the witness only knew of the reputation of deceased for violent and turbulent disposition, which was of a dangerous character, in the State of Mississippi, and knew nothing of his reputation in Louisiana in the neighborhood in which defendant and deceased resided.

In the case of the State vs. Nash and Barnett we ruled that the reputation of the deceased in a distant community, not brought to the knowledge of the defendant, was inadmissible testimony. 45 An.

Bill No. 4. The defendant, who was sworn in his own behalf, was asked why he carried the gun to the ground, and he answered he had heard of threats of deceased against him; and at the same time

other witnesses were offered to prove communicated threats of deceased against accused. This testimony was rejected by the trial judge on the ground that no overt act of hostility of deceased against accused had been shown as a necessary foundation for the receiving of evidence of communicated threats. This ruling is in line with the uniform rulings of this court. State vs. Ford, 37 An. 461; State vs. Harris, 45 An.; State vs. Nash and Barnett, 45 An.

Bill No. 5 is disposed of for the reasons assigned in reviewing bills 3 and 4.

The grand jury who returned the bill against the defendant summoned before them several parties and permitted others to visit them on business directly connected with the official duties of the grand jury. They in no way were connected or interested in defendant's case and they were not interrogated in reference to it, and nothing was said or done by the grand jury while these parties were before them in reference to the case of defendant. The case of the defendant was in no way prejudiced against him, and it is difficult to see in what manner he was injuriously affected.

It is complained by the defendant that one S. A. Morgan, the leading State witness, went without summons or request before the grand jury and gave his own version of the case against defendant, and instituted this prosecution. The witness had the undoubted right to go before the grand jury voluntarily and disclose his knowledge of facts in the the case. As a good citizen it was his duty to do so. No one can be excused for withholding knowledge of a crime from the public until he is summoned to give his testimony of its commission. The record does not show that there was any misconduct on the part of the grand jury. On the contrary, the trial and conviction of the defendant is an evidence that they acted with a due regard for the public safety in presenting the indictment against him.

The defendant was arraigned and pleaded not guilty. Subsequently this plea was withdrawn, and a motion to quash the indictment was filed. The withdrawal of the plea of not guilty placed the defendant in the position as though he had never pleaded to the indictment. He was not subsequently arraigned, and he was tried and convicted without any issue between him and the State. This is fatal to the verdict. The defendant must plead personally to the indictment, and this absolute requirement must be observed and the record must show it. State vs. Hunter and Frank, 43 An. 157.

The omission to plead to the indictment was taken advantage of by the defendant in a motion in arrest of judgment. It must prevail.

Judgment affirmed.

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No. 377.

STATE OF LOUISIANA VS. FELIX POLLET.

A list of additional jurors drawn by the order of court by the jury commissioners to supply deficiency of regular panel, to serve on defendant's case, must be served on him in accordance with Section 992, Revised Statutes.

APPEAL from the Twelfth District Court, Parish of St. James. *Guion, J.*

R. McCulloh for the State, Appellee.

E. N. Pugh and *Sims & Pochè* for Defendant and Appellant.

The opinion of the court was delivered by

McENERY, J. The defendant was tried for murder, found guilty without capital punishment, and sentenced to imprisonment at hard labor for life. He appealed.

The trial judge ordered the clerk, in view of the possibility of exhausting the regular panel, to notify the jury commissioners to meet in open court and draw thirty additional jurors to pass upon defendant's case.

The defendant complains that this list of jurors was not served on him two entire days before the trial. The list was not served on him, but a copy was served on his attorney. This was not a compliance with the law, as Sec. 992 of the Revised Statutes requires that the list be served on the defendant.

It is contended by the State that the law does not require that a list of jurors drawn under Sec. 7 of Act 44 of 1877, in anticipation of the exhaustion of the regular panel, should be served on the defendant, as they are not a part of the regular venire, and are tales jurors, to be in attendance in case the panel should be exhausted.

Section 7 of said Act 44, we think, clearly distinguishes jurors

drawn by the jury commissioners under the order of the court and those summoned instanter by the sheriff from among those in the court room and vicinity.

The authorities referred to by the district attorney, which dispense with the service of the list of jurors on the defendant, are in those cases where the jurors were summoned from among the bystanders by the sheriff for instant service, and when there was no time to serve the list on the defendant.

In the case of State vs. Stewart, 34 An. 1037, it was held that jurors drawn as talesmen, under Section 7 of Act 44 of 1877, although designated as such in the act, are not assimilated to talesmen drawn from among the bystanders, a list of whom can not be made and served on the accused in the time required by Section 992 of the Revised Statutes.

And it was further held that the list of tales jurors drawn in pursuance of said section of said act must be served on the defendant, in accordance with Section 992, Revised Statutes.

In that case the jurors were ordered drawn to serve generally at the term of court in all criminal cases. But we do not see in what manner the effect of the statute can be changed by ordering that the jurors serve on a particular case, as was done in the case of defendant.

It would seem that there is stronger reason for the service of the list of jurors in such case.

In the case of State vs. Chambers, 45 An., objection was made that no list of the additional jurors, drawn in pursuance of Section 7 of Act 44 of 1877, had been served on the defendant two entire days before his trial, and that the order specified the particular case in which they were to serve.

The judge ordered the jury commissioner to draw seventy-five additional jurors to serve on the case of defendant in that case. We held that this did not vitiate the drawing, and found that the list had been served on defendant in accordance with the law. We took occasion to say that the object of the statute, Sec. 992, R. S., in requiring a list of the jurors to be served on the defendant is that he may have an opportunity of inquiring into the character and qualifications of the jurors who are to pass on his case, and be able to prepare with intelligence the challenges which he may wish to present.

In the case at bar the jurors were drawn for the special purpose

of passing on defendant's case, and as a fact some of them formed a part of the jury impaneled to try him. He was deprived of the benefits of Sec. 992, R. S., and we think the trial judge erred in forcing him to trial over his objection that he had not been served with a list of jurors who were to pass on his case two entire days before his trial. 34 An. 1037; 45 An. 36.

It is therefore ordered, adjudged and decreed that the judgment appealed from be annulled and reversed, and it is now ordered that this case be remanded to be proceeded with according to law.

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No. 352.

STATE OF LOUISIANA VS. R. W. MILLER.

The accused was charged with burglary armed with a dangerous weapon.
He was found guilty of burglary without a dangerous weapon.
The verdict finds all the circumstances which constitute the offence under Section 880 of the Revised Statutes, except that the accused was not armed with a dangerous weapon, an offence denounced under Section 851 of the Revised Statutes.
The offences are cognate, the latter, the minor, is included within the terms of the major.
The verdict is responsive and warrants a judgment

APPEAL from the Tenth District Court, Parish of Natchitoches. *Andrews, J.*

John R. Land, District Attorney, for the State, Appellee.

Charles V. Porter for Defendant and Appellant.

The opinion of the court was delivered by

BREAUX, J. Under an indictment charging the defendant with the crime of burglary, also with larceny in a single count, armed with a dangerous weapon, the defendant was tried and found guilty of burglary without a dangerous weapon.

The counsel for the accused filed a motion in arrest of judgment on the ground that the verdict is not responsive to the indictment.

The motion was overruled.

From the ruling of the district court the defendant appeals.

The verdict finds the defendant guilty of a part of the charge,

but passes upon the whole by qualifying that the act was committed without a dangerous weapon.

Section 850 of the Revised Statutes denounces the breaking or entering into a dwelling house with a dangerous weapon.

The Section 851 of the Revised Statutes provides that if the accused person be not armed, he shall, on conviction, be imprisoned at hard labor not exceeding fourteen years.

The accused was found guilty of part of the charge, and virtually acquitted as to the residue.

In thus limiting their verdict it is brought within the terms of the case of the State of Louisiana vs. Jacob Morris, 27 An. 481, in which the issue decided is identical to that of the case at bar.

In that case the prisoner was charged under Section 850, Revised Statutes, with having forcibly entered the house in question in the night time, armed with a dangerous weapon with intent to kill.

He was found guilty except that he was not armed with a dangerous weapon.

The court decided that the verdict is responsive to the indictment.

That the two sections, 850 and 851, form but one law.

That under a charge of forcibly breaking into a dwelling, armed with a dangerous weapon, with intent to kill, an accused may be found guilty of having forcibly entered the house in question without being armed with a dangerous weapon.

From the evidence it appears that the defendant has not been guilty to the extent of the charge specified.

That in finding him guilty to the extent the evidence warrants, the offence is within the terms of another statute—so decided in a previous case.

They are offences of the same generic class; the offence found is of an inferior degree to that charged in the indictment against the accused.

The verdict finds all the circumstances constituting the offence under the statutes.

The difference in the penalty of the offences under the sections in question, and the fact that they are separate statutes, does not preclude the possibility of the offences being of the same generic class. State vs. Stouderman, 6 An. 286.

The offence is of an inferior degree, and a minor offence included within the major offence.

Counsel contends that the verdict is fatally defective, not being responsive to the indictment.

It is true that the defendant is charged with a specific statutory offence, viz., the breaking and entering a certain house, at a time stated, with certain intent.

The crime as denounced is the common law crime of burglary—without a dangerous weapon.

The verdict referred to Section 851 exclusively: "Burglary without a dangerous weapon."

Larceny is a statutory offence; a verdict of guilty of larceny would be unobjectionable. The same is true of arson and every well defined offence.

Moreover the statute itself characterizes the crime as a burglary.

The jury returned that the accused is guilty of "such burglary" as expressed in the statute.

The conclusion of the district judge does not disclose error.

It is therefore ordered that the judgment of the District Court be affirmed with costs.

No. 354.

STATE OF LOUISIANA VS. JOHN NICKLESON.

An indictment for arson may charge the offence as wilfully done or maliciously done, or each of the qualifying words may be used alone.

The entry as made, noting the presence of the accused, makes it evident that he was present during every important stage of the trial.

It is shown that the confession admitted in evidence was free and voluntary, and it was therefore admissible.

Between the ages of seven and fourteen years an infant is deemed *prima facie* to be *doli incapax*, but the maxim *malitia supplet ætatem* may apply. The legal presumption of incapacity may be rebutted by evidence of mischievous discretion.

Expert testimony is admissible to prove capacity for commiting crime.

APPEAL from the Fourth District Court, Parish of Jackson. *Wear, J.*

John R. Land, District Attorney, for the State, Appellee.

The opinion of the court was delivered by

BREAUX, J. The defendant was charged with arson under Section 843 of the Revised Statutes, was tried and found guilty.

A motion to quash the indictment was filed on the ground that the bill of indictment does not set forth as required by the statute that the act charged was wilful.

The indictment charges that the defendant "did unlawfully, maliciously and feloniously set fire and burn a certain outhouse, to-wit: a barn," thereby complying with the statute, which declares that every person "who shall wilfully or maliciously set fire to or burn any outhouse, stable or barn, etc., shall upon conviction suffer imprisonment at hard labor."

The ground presumably is abandoned, for it is not argued in counsel's brief.

The point was passed upon in the case of the State vs. Philbin, 38 An. 964, in which it was held that the words, viz.: "Feloniously, unlawfully and maliciously are sufficient in an indictment under Section 841 of the Revised Statutes.

The words may be conjunctively used as wilfully and maliciously, or disjunctively maliciously or wifully. The use of either of these qualifying words is a legal compliance with the statute. State vs. Price, 37 An. 218.

The points urged before this court are that there is error in that the record does not disclose the presence of the accused at the trial except after the evidence had been introduced and the argument closed.

A bill of exception was reserved to the court's ruling in admitting, over the defendant's objection, the testimony of a witness to prove the confession of this defendant, a child between the age of 10 and 12 years. The grounds of objection are that the State had not laid the basis for the introduction of the confession.

The evidence of this witness was written down and annexed to the bill and is now, without objection, before the court.

A bill of exception was also reserved to the court's ruling admitting the testimony of the witnesses to prove the intelligence and criminal capacity of the accused.

Relating to the presence of the accused during the trial.

The minutes prove that the accused was arraigned on the 20th February, 1893.

The following was entered on the minutes on the 25th August, 1893:

"Trial of case resumed; evidence closed; argument of counse

heard and accused found guilty as charged, the accused and his counsel being present."

The record affirmatively shows that he was present.

The entry is sufficient to establish that he was present at every important stage of the trial.

The special entry, it is true, should have been made noting the presence of the accused at every important stage during the trial. Such omissions of the clerk should be avoided.

But the entry as made makes it evident that the accused was present during the trial. State vs. White, 33 An. 1221; State vs. Atkins, 33 An. 1253; State vs. Price, 37 An. 215.

The admission of defendant's confession presents the second ground of defence.

It is contended that the State did not affirmatively show that the confession was free and voluntary, and without threat, inducement or persuasion.

The witness to whom the confession was made says: "The accused made a confession to me. I did not offer him any inducement to make this confession. I did not threaten him in any manner. He made the confession free and voluntary, with his own free will. I remember the substance of all he said in that conversation, and can repeat the substance of all he said in that conversation."

The cross-examination which followed after the testimony in chief did not elicit any fact establishing that the confession was not free and voluntary. There were no circumstances of duress or violence shown, nor the least menace.

The trial judge, who knew the parties, was satisfied that there had not been any undue or improper influence brought to bear.

The records do not disclose that his rulings relating to the foundation upon which the confession was admitted is erroneous.

The last ground of defence is disclosed in a bill of exceptions to the judge's ruling in permitting witnesses to testify as to their opinion of the intelligence of the accused.

Counsel contends that the ability to commit a crime must appear from the circumstances of the particular case.

The following are the judge's reasons narrated in the bill of exceptions: "The inquiry as to the capacity is not limited to the facts and circumstances attending the commission of the act, but may be shown by extreme proof."

A child under the age of twelve years is presumed to be incapable of crime, but the presumption may be removed by proof that he had sufficient capacity to understand the wrongfulness of his act. Rice on Ev., p. 26.

Blackstone says: "Under seven years of age, indeed, an infant can not be guilty of felony, for then a felonious discretion is almost an impossibility in nature." He adds: "Convictions have been had of infants between seven and fourteen.

"But in all such cases the evidence of that malice which is to supply age ought to be strong and clear beyond all doubt and contradiction."

Brown's Legal Maxim announces that malice supply the want of mature years, that between the ages of seven and fourteen years an infant is deemed *prima facie* to be *doli incapax*, but that the ordinary legal presumption may be rebutted by strong and pregnant evidence of mischievous discretion, for the capacity of doing ill or contracting guilt is not so much increased by years and days as by the strength of the delinquent's understanding and judgment.

Archbold's Criminal P. and P., pp. 11 and 12, announces the same rule.

"No act done by any person over seven and under fourteen years of age is a crime, unless it be shown affirmatively that such person had sufficient capacity to know that the act was wrong." Stephen Dig., Arts. 25, 26.

The question does not relate to the competency of the witnesses in matter of opinion evidence.

The records do not disclose the character of the evidence sought.

The question and the objection are general in term.

Opinion is competent evidence upon the subject of age in the absence of positive testimony upon the subject.

The opinion of witnesses may be heard in many respects to establish sufficient capacity to know that the act was wrong.

The rule under which opinion evidence is admitted as to sanity or insanity applies in proving the responsibility *vel non* of infants.

The forms of law have been complied with and the trial regularly conducted.

The jury must have been satisfied that the defendant, at the time "that he committed the offence, knew it was wrong, and was aware of his legal responsibility for the commission of the crime—the legal

presumption of his innocence on account of his tender years no longer exists." Willet vs. Com., 13 Bush, 230.

These are issues which must be considered settled after a verdict has been rendered in due form.

The tender years of the defendant, should his conduct yield to good influence, will doubtless recommend him to another authority.

To this tribunal is left the painful duty of affirming the judgment appealed from.

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No. 356.

THE STATE OF LOUISIANA VS. ED. FOSTER.

In capital cases, where the jurors have separated and the sheriff, or his deputy has failed to properly keep them in charge, abuse and misconduct will be presumed and the verdict will be set aside.

APPEAL from the Sixth District Court, Parish of West Carroll. *Ellis, J.*

John R. Land, District Attorney, for the State, Appellee.

The opinion of the court was delivered by

PARLANGE, J. The defendant having been indicted for murder, was tried, found guilty of manslaughter and sentenced to imprisonment in the State penitentiary for a term of twenty years. He has appealed. He relies, for the reversal of the judgment against him, upon three bills of exception. The gravest complaint which he makes is as to the refusal of the judge *a quo* to grant him a new trial. The motion for a new trial alleges, among other matters, that the jurors separated while they were deliberating; that they drank a large quantity of whiskey; that one or more of the jurors were under the influence of liquor, and that while they were deliberating they were boisterous and noisy, so much so that on one of the two nights during which they were deliberating, their noise prevented the inhabitants of the town from sleeping. The motion for a new trial sets out at length and in detail the alleged misconduct.

From the testimony of the deputy sheriff who was in charge of the jury, it clearly appears that the jurors separated. After they had entered upon their deliberations the deputy sheriff took them to his

house, which is about three hundred yards from the court house. The ten white jurors were placed in one of the rooms in the house and the two colored jurors were placed in the kitchen, at a distance of about thirty-five feet from the room in which the white jurors were. After the jurors had retired for the night the deputy sheriff left the room in which the white jurors were, and he occupied another adjoining room. There was no officer with the white jurors during that night, nor was there any with the colored jurors. The doors of the rooms were not locked. The jurors might have left their rooms without the knowledge of the deputy sheriff. There is a back door to the room in which the colored jurors slept, and they might have gone out of their room without the knowledge of the deputy sheriff.

These facts are clearly established. There was no attempt to disprove them. The deputy sheriff admits them.

It is well established that in capital cases the jury can not be permitted to separate. 4 An. 434; 5 An. 398; 11 An. 282; 12 An. 710; 21 An. 321.

In capital cases, upon a separation of the jurors, misconduct and abuse will be presumed. 8 R. 554; 21 An. 321; 23 An. 213; 41 An. 691; 43 An. 828.

In State vs. Warren, 43 An. 828, this court held that in a capital case a separation of the jury, part of the jurors remaining without a deputy in charge, while the others are led out of the building, is fatal to the prosecution.

The defendant is so manifestly entitled to relief because of the separation of the jurors and by reason of the failure of the deputy sheriff to properly remain in charge of them, that we consider it unnecessary to pass upon the other questions presented.

It is therefore ordered that the verdict of the jury be set aside and the judgment appealed from annulled, avoided and reversed; that the defendant be detained in custody, subject to the orders of the Sixth Judicial District Court for the Parish of West Carroll, to await further prosecution or proceedings according to law.

No. 358.

STATE OF LOUISIANA VS. WILLIAM LANGFORD.

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A witness having stated that "she does not know what would be the consequence, nor how she would be punished, if she testified falsely;" and the judge having certified that "from the manner of the witness on the stand and

her answers to questions, she exhibited as much intelligence as ordinary persons of her class," *Held:* That the witness is "a person of proper understanding" under Act 29 of 1886, and that her statement does not show that she is ignorant of the nature of an oath.

2. A person to whom complaint has been made by the victim of a rape, or of an attempt to ravish, can not be permitted to repeat at the trial all the details of the outrage as reported to the witness; but can only testify to the fact of the complaint having been made and to the condition of the victim when making the complaint. As part of the *res gestæ* such statements are admissible and defendant may bring them out on cross-examination. They may also be given to corroborate the testimony of the prosecutrix, but only when her testimony has first been impeached.

3. Where the defendant was being tried for an assault with intent to ravish, and the deputy sheriff in charge of the jury, on being informed that the jury stood 11 to 1, said to the juror opposed in opinion to the other jurors: "Why, John! Plain case," *Held:* That the verdict of "guilty" brought in by the jury was vitiated by the misconduct of the deputy sheriff.

4. Where an information for assault with intent to ravish, charges that the defendant "with force and arms, unlawfully did make an assault upon A B, with intent her the said A B then violently and against her will feloniously to ravish and carnally know," the information is sufficient.

APPEAL from the Fourth District Court, Parish of Grant. *Wear, J.*

John R. Land, District Attorney, for the State, Appellee.

W. C. Roberts for Defendant and Appellant.

The opinion of the court was delivered by

PARLANGE, J. The defendant has been found guilty by a jury of an assault with intent to ravish and he has been sentenced to imprisonment in the State penitentiary for a term of eighteen months. He has appealed, and he relies upon four bills of exception to reverse the judgment of the lower court.

By his first bill of exception he contends that the prosecutrix "was not a competent witness." The only ground for this contention is that on cross-examination, she stated that "she did not know the consequence, nor how she would be punished in case she testified falsely."

The judge *a quo*, in overruling the objection to the competency of the witness, stated that "from the manner of the witness on the stand and her answers to questions, she exhibited as much intelligence as ordinary persons of her class."

We understand the defendant's counsel to contend in his brief that the statement of the prosecutrix proves her to be a person who does not understand the nature of an oath. This contention is without force. There is nothing in the record to support it. The prosecutrix may well have meant that she was ignorant of the instrumentalities by which the criminal law would punish her if she committed perjury, and that she did not know what the legal penalty would be. This would neither prove her to lack "proper understanding" within the meaning of Act 29 of 1886, nor to be ignorant of the nature of an oath. We are fortified in reaching this conclusion by the statement of the judge *a quo* who heard and saw the witness and to whom a large discretion is left in the matter.

The judge refers evidently to the intelligence and mental capacity of the witness, and he did not consider the statement as relating to her ability to comprehend the nature of an oath. Competency is the rule, incompetency the exception. The burden is on the defendant to show the witness incompetent. He has failed to do so. If his intention was to show that the prosecutrix did not understand the nature of an oath, he could easily have addressed her such questions as would have made the scope of his inquiry clear to her and would have elicited from her such an answer as would have shown plainly whether she had or had not the proper understanding of the nature of an oath.

The second bill of exception reserves the objection of defendant to the admission of the testimony of a witness who was offered by the State to prove the statements made to him by the prosecutrix as to the crime for which the defendant was being tried.

In the case of State vs. Charles Robertson, 38 An., page 618, this court held that a person to whom complaint has been made by the victim of a rape, when placed on the witness stand, can not be permitted to repeat all the details of the outrage and the name of the ravisher, as reported to the witness, but can only testify as to the fact of the complaint having been made and as to the condition of the victim when making the complaint. Bishop in his treatise on Criminal Procedure states that this is the English and the more common American practice. To the same effect is Greenleaf on Evidence. When the statements are part of the *res gestæ*, they are excepted from the operation of the rule just stated, and they may also be drawn out by the defendant on cross-examination. They

may be admitted to corroborate the testimony of the prosecutrix, but only when her testimony has been impeached. When they are offered by the State, in making out the case against the accused and before the testimony of the prosecutrix has been impeached, they will be rejected, as was done in the case of State vs. Charles Robertson just quoted.

In the instant case, the State offered the testimony without limitation. The testimony appears to have been offered while the State was making out the case against the accused and before the defence had opened.

The judge *a quo* states that the evidence was admissible in corroboration of the testimony of the prosecutrix and that he limited it to that purpose. The statements could not have been admitted in corroboration, unless the testimony of the prosecutrix had first been impeached, of which there is no proof or indication in the record.

On the contrary, it appears that the statements with all their details went to the jury before the defence opened. This was error.

The third bill of exception concerns the refusal of the judge *a quo* to grant the defendant a new trial for which the latter had moved on the ground that the verdict was contrary to the law and the evidence, and that "the jury while considering the verdict herein were improperly and unduly influenced by the deputy in charge thereof, who stated to them 'that it was a plain case or straight case,' and further stated and exclaimed: 'Why, John!' one or more times when informed that one John Wilson was holding them. That by said conduct the said John Wilson was influenced and the verdict rendered by said jury vitiated."

The testimony adduced on the hearing of the motion for a new trial was reduced to writing, and the defendant having duly excepted to the overruling of the motion and having annexed said testimony to his bill, the same is before us for review. There were several objections made to testimony offered on the hearing of the motion for a new trial, but it is unnecessary for us to pass upon them, as we can reach a conclusion on this point by considering only the testimony admitted without objection.

We are satisfied from the evidence that the deputy sheriff in charge of the jury went into the jury room after the jury had been deliberating for some time, and on his inquiring whether the jury had agreed he was informed that the jury stood eleven to one, and that John Wil-

son was the one juror opposing the views of the other eleven jurors. The deputy sheriff then exclaimed and said to John Wilson: "Why, John! Plain case," or words of a similar import. Subsequently the jury agreed and brought into court a verdict against the defendant.

While bearing in mind the decisions of this court, which declare that great weight is given to the rulings of trial judges in refusing new trials, and while also bearing in mind the decisions which differentiate between misconduct which vitiates a verdict and misconduct which does not, we hold, in the instant case, that it was error to refuse a new trial. The question goes beyond the scope of mere legal formalities. It is a matter of substance which affects the rights of the defendant to a fair and impartial trial. It would be difficult to state a case of unlawful communication with the jury by the officer in charge of the jury, if a deputy sheriff can be permitted to exclaim reprovingly to a juror for not agreeing to the verdict which the deputy sheriff conceives should be returned, and if that officer can state to the juror that the case is plain. See Proffatt on Jury Trials, Sec. 391.

In the case of State vs. Dallas, 35 An. 900, this court reversed the sentence in a criminal case because one of the deputy sheriffs in charge of the jury stated to one of the jurors that he had heard that the defendant had been sentenced to the penitentiary. In that case the court used the following language:

"The conduct of the deputy sheriff is in the highest degree unbecoming and reprehensible and places him in the attitude of an officer who deliberately impedes the administration of justice, which it was his bounden duty to promote, and wilfully clogs the execution of the laws which he has sworn to support. * * * A sheriff or any of his deputies having charge of a jury in a criminal case has the right of speaking to the jurors for the purpose of inquiring into and ascertaining their wants, or of conveying necessary messages from them. Such conversations, when not referring to the case, or to the accused on trial, will not vitiate the proceedings."

We are clear that the misconduct of the deputy sheriff who was in charge of the jury in this case caused serious injury to the defendant, and that his motion for a new trial should have been granted.

The fourth bill of exception contains the defendant's reservation as to the action of the judge *a quo* in overruling the motion in arrest

of judgment by which the defendant urged that the information is defective in that it fails to charge that he did "feloniously" make the assault charged; and also in that it fails to charge that he made the assault "forcibly" or "violently."

The information charges that the defendant with force and arms unlawfully did make an assault upon the prosecutrix, with intent her the said prosecutrix then violently and against her will feloniously to ravish and carnally know. The information is sufficient. State vs. Bradford, 33 An. 921; State vs. Sonnier, 38 An. 962; 2 Bishop, Cr. Pro., Sec. 81.

Therefore, for the reasons stated in sustaining defendant's objections, as set forth in his second and third bills of exception, it is ordered that the verdict of the jury be set aside and that the judgment appealed from be annulled, avoided and reversed; that the defendant be detained in custody subject to the orders of the Fourth Judicial District Court for the parish of Grant, to await further prosecution or proceedings according to law.

No. 384.

THE STATE OF LOUISIANA VS. ZACHARIAH LANGSTON.

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Under Sec. 792 R. S., which denounces the offences of assaulting another by *wilfully* shooting at him, an indictment is fatally defective which charges that "A B did wilfully make an assault upon C D by shooting at him." The characterization of the assault is essential, and the indictment should follow the statute.

APPEAL from the Fifth District Court, Parish of Morehouse. *Richardson, J.*

J. P. Madison, District Attorney, for the State, Appellee.

The opinion of the court was delivered by

PARLANGE, J. The defendant was charged with an assault upon one Richard Berry by shooting at said Berry. The defendant was tried by a jury, found guilty and sentenced to imprisonment in the State penitentiary for a term of six months. He has appealed, and he relies, for the reversal of the verdict and sentence, upon the error which he urges to have been committed by the trial judge in overruling his motion for a new trial.

The reasons for which the new trial was asked are:

1. "That the defendant is indicted under Sec. 792 of the Revised Statutes of the State of Louisiana, for 'assault by wilfully shooting at,' and that the indictment charges him with wilfully and feloniously making an assault upon one Richard Berry, by shooting at said Berry, and that the omission of the word 'wilfully' as qualifying the 'shooting act' renders the indictment invalid and fatally defective." * *

2. "That the offence charged is a statutory one, and the offence should be set forth in the language of the statute, which is not done in this indictment, and that the offence charged is not denounced as a crime by the statutes of the State of Louisiana."

The indictment purports to have been drawn under Sec. 792 of the Revised Statutes, which section makes it penal to "assault another by wilfully shooting at him."

The question is whether under such a statute an indictment is good which charges that a defendant "did wilfully make an assault upon another by shooting at him."

The words "wilful," "wilfully," have a significance. The word "wilfully" is not to be treated as surplusage or as being immaterial in the statute under consideration. On the contrary, it is essential to the description of one of the offences denounced in Sec. 792 Revised Statutes. That statute provides punishment for any one who commits a particularized assault, to-wit: An assault by wilfully shooting at another. It is perfectly clear that under Sec. 792 Revised Statutes, a person could not be punished for commiting an assault by a "shooting at," which would not be "wilfully" done within the intendment of that statute, and therefore the indictment must charge the "shooting at" to be "wilfully" done.

The defendant in the Brady case, 39 An. 687, was prosecuted under Section 792 Revised Statutes, and on a charge identical with the one in this case. In the Brady case the indictment charged both the assault and the "shooting at" to be wilfully committed. This court said:

"Now, as the indictment propounds the charge of a felonious, malicious and wilful assault 'by wilfully shooting at,' it is clear that it does contain a charge of an offence known to our laws, since the same is specially denounced in the statute under discussion. And as the language used in the indictment is already redundant by the qualifications of the assault, which were not necessary under the terms of the statute," etc.

This language shows that the views herein expressed are in conformity with the opinion in the Brady case.

The indictment in this case is fatally defective.

It is therefore ordered that the verdict of the jury and the judgment of the court appealed from be annulled, avoided and reversed; and that the defendant be detained in custody subject to the orders of the Fifth Judicial District Court for the parish of Morehouse, to await further prosecution or proceedings according to law.

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No. 361.

CHARLES J. RANDALL VS. W. E. HAMILTON.

1. Plaintiff, in an action for damages for a libel, has the right to specifically affirm in his pleadings, and on a trial, to prove the non-existence of the conditions upon which would be dependent a right of exemption from liability, grounded on the fact that the matters complained of were charged in a judicial proceeding; he can not be cut off from establishing his allegations to that effect by an exception of no cause of action.
2. The fact that matter defamatory and libelous in its character was charged in the petition of a plaintiff against a defendant does not of itself carry absolute exemption from liability for damages claimed by reason of said defamatory and libelous charges. Other facts must concur to bring about that result.
3. There is a great difference between an absolute exemption from liability for damages for acts done in the course of judicial proceedings under a given state of facts proven, and an absolute exemption from liability to a suit for the purpose of testing whether such a state of facts exists as would convey with it such protection from damages, and between the situation of parties at the end of a lawsuit after evidence adduced and that of parties at its beginning standing on pleadings.

APPEAL from the First District Court, Parish of Caddo.
Taylor, J.

Leonard & Thatcher, M. S. Jones and *Alexander & Blanchard* for Plaintiffs and Appellants.

Wise & Herndon for Defendant and Appellee.

The opinion of the court was delivered by

NICHOLLS, C. J. The defendant in this case having filed an exception of no cause of action to plaintiff's demand, the allegations of the petition will have to be given in full.

Plaintiff avers that on or about June 22, 1892, William E. Hamilton, through his attorney, instituted in the District Court for Caddo a suit entitled "The Shreveport Electric Railway and Motive Power Company vs. The City of Shreveport et al.," by filing a petition verified by his oath made and subscribed to before Cal. D. Hicks, notary public of said parish, on June 21, 1892, whereon he obtained from the Hon. S. L. Taylor, judge of said court, on June 22, 1892, a writ of injunction. That in said petition and affidavit, said Hamilton represented himself to be the president of a pretended corporation, styled in said petition The Shreveport Electric Railway and Motive Power Company, and therein falsely described as a corporation duly chartered, organized and existing under the laws of the State of Louisiana.

That in said petition, among others, the following allegations are made, viz.:

"That said pretended company had been granted and vested with certain rights, privileges and franchises by an ordinance of the council of the city of Shreveport of July 23, 1891, and that such rights, privileges and franchises were held by and vested in said company.

"That in the exercise of such rights, said Hamilton, as president of said company, employed a gang of laborers, and was with them engaged in constructing a railroad along Southern Avenue in said city, on June 20, 1892, when the police officers of said city, acting under the authority of the mayor and council of said city, arrested him and said laborers, and forcibly prevented them from continuing such work.

"That said policemen, mayor and council, in their interference with the rights vested in said company by said ordinance, claim that said ordinance and all rights thereby vested were repealed by said council at its session on June 9, 1892.

"That such pretended repealing ordinance is an attempt to divest vested rights and is illegal, null and void. That Herman Herold, Charles J. Randall, W. D. Scholfield, John C. Wimbish and Henry H. Youree, members of the council of said city, entered into a conspiracy with certain persons connected with and interested in the "City Railroad Company," a rival corporation, to pass said pretended repealing ordinance; that said conspiracy was conceived and executed solely in the interest of said City Railroad Company and

its owners, and without any regard to the rights of said Hamilton's company or of the public.

"That such conspiracy so concocted was kept a profound secret from the mayor and from the remaining members of the City Council and from the public, and maintaining inviolably the injunction of secrecy imposed on them by said parties, whose interests alone they were to subserve. The said members of said council refused to entertain a motion to postpone for investigation, made by a member not a party to said conspiracy, and refused to hear the opinion or follow the advice of the city attorney, because they had aready taken the advice of the retained counsel of said City Railroad Company.

"That said conspiracy and all the acts in pursuance thereof on the part of the aforesaid members of the City Council were illegal, wrongful, tortious, and a fraud on the rights of said Hamilton's company." All of which foregoing fully appeared from a certified copy of said petition annexed and made part hereof.

That said suit was dismissed by judgment of the District Court for Caddo on exceptions of defendants thereto, for reasons assigned in said judgment, which said exceptions and judgment therein are made part hereof by reference.

That he is now and was at the date of the adoption of the ordinance of July 28, 1891, purporting and intending to grant certain franchises fully set forth in the petition of said W. E. Hamilton in said suit, and that he voted as a member of the City Council against said ordinance; that he is now and was a member of the City Council on June 9, 1892, and as such voted for the ordinance adopted and enacted on said date by said council repealing the ordinance granting certain rights to "The Shreveport Electric Railway and Motive Power Company," and that it was his right and his duty so to vote for the reasons (among others) assigned by the Caddo District Court in the opinion and judgment dismissing said suit, No. 4001.

That the charges made against him and his fellow members of said council in the petition in said suit No. 4001, and verified by the oath of said W. E. Hamilton, and the allegations of said petition with regard to himself and his fellow members, in so far as they affect the petitioner, are false, libelous, and slanderous, and calculated to injure and destroy the character and reputation of petitioner as a private citizen and public official, and his credit and repute as a business man,

and that said charges and allegations constitute a charge of felony, and a criminal and infamous offence under the laws of the State of Louisiana; and that said W. E. Hamilton well knew when he published said charges and verified them by his oath, that same were false, libelous, and slanderous, and same were maliciously made and with full advice. That said charges and allegations were so made and published by said W. E. Hamilton without cause, wantonly, maliciously, and with intent to injure petitioner; and that said charges as made and published in said petition the said Hamilton has verbally reiterated, made and published at various and divers times before and after the institution of said suit No. 4001, to citizens of Shreveport and to others, with design to injure petitioner and destroy his character and credit. That the said petition of the said Hamilton in said suit No. 4001 shows on its face no cause of action against petitioner and the other members of the Common Council named therein; and that he and said other members were made defendants in said suit wantonly, maliciously, and for the corrupt purposes of influencing thereby the official action of petitioner and said other members in the interest of said Hamilton and a certain corporation, to-wit, "The Shreveport Railway and Land Improvement Company," wherein said Hamilton is a large stockholder, together with his father-in-law, Edward Jacobs, his brother-in-law, Walter B. Jacobs, and wherein said W. E. Hamilton, Edward Jacobs and W. B. Jacobs, and the First National Bank of Shreveport (whereof said E. Jacobs is president, said W. E. Hamilton is vice president, and said W. B. Jacobs is cashier), are large stockholders, and are otherwise largely interested, it being the purpose and intention of said Hamilton to destroy the value and force the sale to said "Shreveport Railway and Land Improvement Company" of the property and franchise of the "Shreveport City Railway Company," a rival corporation.

That since the judgment of the Caddo District Court dismissing said suit No. 4001 the road and franchise of said City Railroad Company have been purchased by the Shreveport Railway and Land Improvement Company, or by the parties principally interested therein. That if it be true, as alleged in the said petition of said Hamilton, that the ordinance of June 23, 1891, therein set forth, vested rights and privileges in the "Shreveport Electric Railway and Motive Power Co.," then the repealing clause of June 9, 1892, was unconstitutional, null and void, and such rights and privileges were

not thereby in any manner impaired or effected, and if said company held no vested rights under said ordinances of July 23, 1891, then said company has no rights nor cause of action as set forth in petition in said suit No. 4001. That under either supposition he and his fellow members of the City Council could not properly be made parties defendant to said suit No. 4001.

That there was no occasion to make him and his fellow members parties defendant in said suit or to make the charges therein made against them; that the allegations and charges made in said petition and affidavit against him and his fellow members of the City Council were not pertinent to the issue or in any manner necessary for the protection of the rights therein alleged to exist. That said suit No. 4001 is not, and never has been, a real suit; that same was and is the fraudulent simulation of a suit; that there was no party plaintiff thereto, and that the pretended corporation styled therein "The Shreveport Electric Railway and Motive Power Company" has no existence, and has never existed, all of which said Wm. E. Hamilton well knew at the time he made said false, malicious and slanderous charges against petitioner and his said fellow members. That his reputation was in all respects good prior to the said charges aforesaid, falsely, wantonly and maliciously made and published by said W. E. Hamilton; that the said charges so made and published have injured his reputation, have been detrimental to his standing and social position in the community where he lives and elsewhere, have had a tendency to degrade him with his fellow men, have impaired his credit and injured his business, which is that of a cotton buyer and factor, and caused same to materially decline to his great financial loss; have subjected him to mortification and insult and have outraged his feelings to an extent which can not be sufficiently measured by money, but at least to the extent of $15,000; that he was entitled to exemplary and punitive damages against said Hamilton to the amount of at least $10,000. That he was compelled to employ counsel to defend him in said suit No. 4001 at an expense to him of $150, for which amount, also, he should have judgment against said Hamilton. He prayed that Hamilton be cited and that he have judgment against him for $25,140, interest and costs.

The District Court held that the exception of "no cause of action" was well taken, and dismissed the suit.

Plaintiff has appealed.

In his reasons for judgment the district judge said: "There can be no doubt that the averments of the petition in Suit No. 4001 are libelous in their character. To charge a public official with having been a party to a fraudulent conspiracy, and to have been influenced in his official conduct by corrupt motives, is certainly a defamation likely to cause a breach of the peace and great injury to the sufferer. Such a charge, if published in a newspaper, would undoubtedly be actionable in damages if it were shown to be false and malicious.

"But defendant contends that this charge was made in the course of judicial proceedings in good faith; that it arose upon a proper occasion and was pertinent to the issue, and is therefore protected as a privileged communication."

"Under the Common Law of England no action lies against an attorney or litigant for defamatory words spoken or written in a pleading in judicial proceedings, even though they were unnnecessary to support the case of the client and were uttered or published without any justification or excuse, and from personal ill will toward the party defamed arising from some previously existing cause, and are irrelevant to every question of fact in issue before the court. It seems, then, that under the English law the mere fact that the defamatory language was used in a judicial proceeding is an absolute protection, regardless of all other considerations."

"Plaintiff's counsel contends that this law has never been adopted in Louisiana; that privileged communications in judicial proceedings are unknown to our law, and that Art. 2315 of the Civil Code furnishes the true and only rule for determining the right of action in all cases—libel and slander included—where damages are claimed for torts, even though the defamatory matter be published in a judicial proceeding. Many authorities are cited to support the position, notably that of Miller vs. Holstein, 16 La. 389.

"I have examined these proceedings and they undoubtedly show that the English law of absolute protection does not prevail here, and that the foundation and measure of liability for a libel uttered in a judicial proceeding are found in Article 2315 of the Code. But I do not understand them as holding that no sort of privileged communications is known to our law."

The learned judge then proceeded to cite and quote a number of decisions in which the defendants in suits brought against them

for damages had been protected from liability by reason of the acts complained having occurred in the course of judicial proceedings, and from those decisions he reached the conclusion that in some cases an absolute exemption from liability existed and that the present case was one of that character.

There is a great difference between an absolute exemption from liability for damages under a given state of facts proven and an absolute exemption from liability to a suit for the purpose of testing whether such a state of facts exists as would convey with it such protection from damages. There is a great difference between the situation of parties at the end of a lawsuit, and after evidence adduced, and that of parties at the beginning of a lawsuit standing on pleadings. There can be no doubt that the fact that an act complained of occurred in judicial proceedings may have a great bearing and influence upon both the burden and sufficiency of proof and the final result on a question of a liability to damages for that act. Such a fact being shown with its attendant circumstances may sometimes afford partial protection—sometimes afford absolute protection, but it may also frequently intensify and aggravate a wrong.

The determination of such questions depends almost necessarily upon facts resting still in *pais*, which can only be positively and finally ascertained through the instrumentality of a suit. Whilst it may be true, that *given* a particular state of facts, legal protection from liability would follow as a matter of law, it is none the less true, that the facts themselves on which exemption is based are open to inquiry and to judicial scrutiny. Any other doctrine would convert the courts of the country into instrumentalities for injustice and into engines of oppression.

Nothing in the Guardemal case, which was one tried on its merits and which turned upon the burden of proof, is out of line with the views herein expressed. In that case this court, speaking of privileged communications, said: "In privileged communications the party is protected from the infliction of damages *unless the occasion was used as a means of inflicting a wilful and malicious injury* upon the plaintiff," and referring to protection resulting from judicial proceedings, declared it "extended to those who were in the honest pursuit of private right." It was never once intimated that the courts of our State were places from which, as from places of secure refuge, they could with impunity perpetrate wrong. 42 An. 955.

We have examined plaintiff's pleadings very carefully. They are both full and precise. If in their consideration we strike out and eliminate the question of "privilege" it must be conceded plaintiff's petition discloses a cause of action.

If we replace that question we find that plaintiff has specifically affirmed the non-existence of the conditions upon which the right of exemption is dependent. He has a right to go to trial upon that issue as one of fact to be ascertained by evidence. For the reasons herein assigned, it is ordered, adjudged and decreed that the judgment appealed from be annulled, avoided and reversed, the case reinstated, and it remanded for further proceedings according to law.

No. 363.

H. H. YOUREE vs. W. E. HAMILTON.

Same syllabus as in Case No. 361.

APPEAL from the First District Court, Parish of Caddo.
Taylor, J.

Leonard & Thatcher, M. S Jones and *Alexander & Blanchard* for Plaintiffs and Appellants.

Wise & Herndon for Defendant and Appellee.

The opinion of the court was delivered by

NICHOLLS, C. J. The pleadings and issues in this case are similar to those in Randall vs. Hamilton, decided this day.

For the reasons therein assigned, it is ordered, adjudged and decreed that the judgment appealed from be annulled, avoided and reversed, the case reinstated and remanded for further proceedings according to law.

No. 378.

J. C. WIMBISH vs. W. E. HAMILTON.

Same syllabus as in Case No. 361.

APPEAL from the First District Court, Parish of Caddo.
Taylor, J.

Leonard & Thatcher, M. S .Jones and *Alexander & Blanchard*, for Plaintiffs and Appellants.

Wise & Herndon for Defendant and Appellee.

The opinion of the court was delivered by

NICHOLLS, C. J. The pleadings and issues in this case are similar to those in Randall vs. Hamilton, this day decided.

For the reasons therein assigned, it is ordered, adjudged and decreed that the judgment appealed from be annuiled, avoided and reversed, the case reinstated and remanded for further proceedings according to law.

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No. 382.

STATE OF LOUISIANA VS. JOHN KENNON.

1. On cross-examination of an accused, upon matters not legitimately to be asked in rebuttal, but which it is claimed might properly be asked by way of impeachment or attack upon the credibility of the witness, prosecuting attorneys should announce the object and purpose of their questions, and offer to restrict the effect of the testimony.
2. Not only error but injury must be alleged and shown to justify the reversal of a judgment.

APPEAL from the Second District Court, Parish of Webster. *Watkins, J.*

John R. Land, District Attorney, for the State, Appellee.

The opinion of the court was delivered by

NICHOLLS, C. J. The appellant was sentenced to hard labor in the penitentiary for the period of seven years, having been convicted of manslaughter under an indictment for murder.

Two bills of exception are in the record and relied upon and urged as grounds of reversal.

The second is to the overruling by the District Court of a motion for a new trial. The first to the action of the court in permitting the district attorney on cross-examination of the accused, when on the stand as a witness in his own behalf, to ask certain questions over defendant's objections.

The motion for a new trial was asked upon the grounds:

1. That the verdict of the jury was contrary to the law and the evidence.

2. That there was no proof adduced on the trial that the crime alleged was committed in the parish of Webster, or that it was committed within twelve months of the finding of the bill of indictment.

3. The discovery since the trial of testimony to prove that the deceased had, a few hours prior to the killing, threatened to kill the accused.

On the trial of this motion the defendant was permitted by the judge to introduce (and have reduced to writing) testimony to establish his allegation that no evidence had been adduced by the State to prove the facts mentioned in his second ground.

On the overruling of this motion a bill of exception was reserved, to which was annexed as part thereof the evidence taken on the trial.

The district judge held that the verdict was sustained by the law and the evidence, and that the testimony claimed to have been newly discovered was merely cumulative; that uncontradicted evidence of the same character had been introduced on the trial, which had caused the verdict to be for manslaughter instead of murder.

The reasons stated by the court justify his rulings. We take occasion to say that it was totally useless to have annexed and brought up the testimony taken for the purpose of establishing that there was no evidence on the trial that the crime was committed in the parish of Webster, or that it had been committed within twelve months of the finding of the bill of indictment.

The point at issue was one of fact, with which this court is powerless to deal.

The first bill is as follows:

"On the trial of the cause A. J. Murff, district attorney, offered to prove by the defendant, who had been sworn as a witness for the defence, that he had, immediate'y after the killing, fled the State, and gone to Arkansas and changed his name, and was a fugitive from justice till arrested by the sheriff of Webster parish, whereupon the defendant objected on the ground that the State had closed its case without intrroducing any evidence of flight. That the defendant as a witness in his own behalf had testified to nothing on this point, nor any of his witnesses; that no answer to the question could pos-

sibly be in rebuttal of anything proved by the defendant in his direct examination, and it was new matter and an effort on the part of the State to cross-examine the witness on matter not stated in his direct examination."

"The objection was overruled by the court," as it was the question on cross-examination of the accused on direct examination on the witnese stand, and as he stated he had only gone a "little way up the road after he shot deceased," indicating that he had not fled, and that there was no objection stated at the time to the question as to changing his name.

"The counsel for the defendant thereupon reserved this bill of exception to the ruling of the court, which bill, upon being submitted to opposite counsel and found correct, was duly granted and signed in open court."

In State vs. Underwood, we held that an accused in a criminal cause who avails himself under Act No. 29 of 1886 of the privilege of testifying is subjected to cross-examination by the State, but that this examination extends only to matters concerning which the witness has given testimony. "That the same statute which withdrew from him disqualification as a witness and subjected him to cross-examination expressly placed a limit to this examination which the State is not permitted to transcend." The object and purpose of this limitation was to guard and secure defendant's constitutional right of not being forced to give evidence against himself.

Taking the bill in the record as a whole, looking at all its recitals, we are of the opinion that the question propounded to the witness by the district attorney, viewed from the standpoint of simple rebuttal testimony or cross-examination, should not have been permitted to be asked. We do not think a simple statement from the accused that after the killing he walked a short distance up the road justified the State in attempting, through the testimony of the accused, to establish that he had immediately after the killing fled from the State and was a fugitive from justice until arrested by the sheriff in Arkansas and brought back.

The cross-examination was sought to be made to take a much wider range than the statement of the accused warranted. We think that the court, in a matter so closely connected with defendant's constitutional rights, should confine the State to cross-examination

upon the matters testified to and not allow it to extend to inquiries to things touching which the district attorney only from what he might deem "indications" should inferentially conclude the accused intended, by pure implication, to testify. In the case at bar we neither think the accused intended to convey to the jury from what he said that he had not fled (for up to the time he made the statement he does not appear to have been charged with having done so), nor do we think that the jury could or would have connected that statement one way or the other with a question of flight. We are of the opinion that for the purposes of cross-examination in rebuttal the question was improper.

The district attorney claims, however, that, admitting this to be true, the State was authorized on cross-examination to attack or impeach the credibility of the witness and that the question of flight might relevantly and legitimately be considered for that purpose. In propounding the question the district attorney did not announce that it was asked for the purpose indicated, nor did he offer to limit its effect. The offer was made generally. The conclusions we have reached upon the bill of exceptions reserved make it unnecessary for us to pass upon the question. We think it proper to say that on cross-examination of an accused upon matters not legitimately to be asked in rebuttal, but which it is claimed might properly be asked by way of impeachment or attack upon the credibility of the witness, the district attorney should announce the object and purposes of his questions and offer to restrict the effect of the testimony. The accused, the court below and this court would be enabled in that way to deal with certainty upon the legal questions involved.

An examination of the bill of exceptions which was reserved has brought us to the conclusion that we can afford the appellant no relief under it. The bill states that the district attorney was permitted over the objections of the accused to ask him a certain question, but it goes no further. Whether the question was asked or not; whether, if asked, the accused refused to answer it or not; what he answered, if he did answer it, are not stated. It may well be that the accused answered the question saying he had never been a fugitive from justice, and may have so stated perfectly consistently with the truth. In other words, even though the question may improperly have been permitted to be asked, the permission to ask

may have resulted in no injury. Not only error, but injury must be alleged and shown to justify the reversal of a judgment.

Appellant has alleged error, but has not alleged or shown injury.

For the reasons assigned it is hereby ordered that the judgment appealed from be and the same is hereby affirmed.

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No. 379.

THE FLORSHEIM BROS. DRY GOODS CO., LIMITED, VS. JOE WILLIAMS.

1. The right of a defendant to appeal from a judgment which has been rendered and signed against him is not impaired by the fact that without warrant of law the court, on motion of plaintiff, had the judgment set aside and the case reinstated on the docket.
2. The court, on appeal from the judgment rendered, having found it based on insufficient evidence, reversed it, but remanded the case for further proceedings. The plaintiff having, after having had the first judgment set aside and the case reinstated on the docket, caused it to be assigned for trial, tried and a second judgment rendered in his favor against defendant without any notice to defendant of these after proceedings, the second judgment is annulled, avoided and reversed.

APPEAL from the Ninth District Court, Parish of DeSoto.
Hall, J.

Goss & Parsons for Plaintiff and Appellee.

J. F. Pierson and *Chas W. Elam* for Defendant and Appellant.

The opinion of the court was delivered by

NICHOLLS, C. J. On February 9, 1892, the plaintiff filed a petition against the defendant, alleging that he was indebted to it in the sum of $2855.30, with legal interest thereon from judicial demand, for goods and merchandise sold him, as would be duly shown on the trial, and prayed for judgment against him for that amount.

On the 2d of March defendant filed an answer pleading the general issue.

On the 13th of April court adjourned to the next term in course, and on the 1st of August met at its regular session.

On the 22d of that month this case was taken up for trial and evidence adduced, and on the next day, the 23d of August, the court rendered judgment in favor of plaintiff against defendant as prayed for, signing it the same day. On the 26th of August, 1892, the court adjourned to the next regular term (November 14), on which day it again convened.

On the minutes of the 14th November the minutes show the following entry:

Judicial District Court, Parish of DeSoto.

THE FLORSHEIM BROS. DRY GOODS CO., LIMITED,
versus
JOE WILLIAMS.

In the above numbered and entitled suit comes the plaintiff by counsel in open court, and moves the court in this case to set aside the judgment rendered therein at the term of the court holden in the month of August, 1892, and refix the case for trial on the ground that said judgment was rendered contrary to law and without sufficient evidence.

On the 16th the court acted on this motion, set aside the judgment, reinstated the case and fixed it for trial for the 19th, on which day it was taken up, evidence adduced and judgment rendered and signed a second time in favor of plaintiff against the defendant, as prayed for in the petition.

On the 2d of December, 1892, the court adjourned to its next regular term.

On the 3d day of May, 1893, the defendant obtained two orders for devolutive appeals—one from the judgment first rendered, on August —, 1892, the other from the second judgment, rendered the 19th of November, 1893, which two appeals he perfected by citing plaintiff and giving bond.

Both judgments bear the same title and the same number on the docket of the DeSoto court, and two transcripts, both also having the same title and number, have been filed in this court under a single number.

From the record it appears that the only evidence adduced on the first trial was an instrument in the following words:

Statement.

SHREVEPORT, La., February 8, 1892.

Mr. Joe. Williams

To the Florsheim Bros. Dry Goods Co., Limited.

DR.

1891.

January 28. To statement rendered	$3,049 03	
August 26. To cash	17 40—	$3,066 43

CR.

March 18. By pro. 10 B. C	312 19	
June 15. By pro. 4 B. C	120 45—	432 64
		$2,633 79
Interest to date		221 60
Amount due us		$2,855 39

STATE OF LOUISIANA, }
Parish of Caddo. }

Personally appeared before me, the undersigned authority, Henry Florsheim, president of the Florsheim Brothers Dry Goods Co., Limited, who deposes and says upon his oath that the above account of Florsheim Brothers Dry Goods Co., Limited, against Joe. Williams for the sum of $2855.39 is just, correct, due and unpaid, and that all credits, offsets and payments known to affiant have been allowed.

HENRY FLORSHEIM.

Sworn to and subscribed before me this 29th day of February, 1892.

LEWIS E. CARTER, *Notary Public.*

This case is in a very anomalous condition. It seems that the plaintiff, after he had obtained a judgment against the defendant, and after the term of court at which it was rendered had closed, became apprehensive that it contained an inherent and radical weakness, of which the defendant could at his leisure avail himself. Not wishing that this situation of affairs should longer continue, he, of his own motion, had the judgment set aside by the court, the case reinstated as an open one upon the docket, and proceeded without notice of any kind to the defendant in any of these after proceedings, to take a new judgment. He ignored the fact that the former judgment had, at the moment he moved to set it aside, become a finality so far as its revision through the instrumentality of a new trial was concerned, and doubtless proceeded upon the

theory that Art. 540 of the Code of Practice, which declares that a judgment once rendered becomes the property of him in whose favor it has been rendered, and that the judge can not alter the same except in the mode provided by law, was not applicable to the party obtaining the judgment, but had reference solely to an alteration to the prejudice of the judgment creditor. That *quoad* the defendant the judgment evidenced an obligation and not a right, and that the judgment obtained being the property of the plaintiff he was at liberty to relinquish the benefit of it and replace matters in the situaion in which they were before it was obtained. That the defendant had no possible ground of complaint, but that he was really a gainer by the change. It is very true that the judgment obtained was the property of the plaintiff, and that to a certain extent he had control over it, but the law did not give him control to such an extent as to injuriously affect the rights of others. It was for the defendant, and not for the plaintiff, to decide whether an alteration in the judgment as originally rendered would be disadvantageous to him or not. Though not the owner in one sense of the judgment, the defendant had certain rights springing from and resting on the judgment from which the plaintiff could not cut him off, one of which was the right of appeal, the *ex parte* setting aside of the judgment to the contrary, notwithstanding.

Of this right he has availed himself, and he is properly before us an appellant from the first judgment.

He claims that that judgment was rendered upon insufficient evidence; that at the time the case was tried it did not stand on default, but upon issue joined on an answer pleading the general denial; that the amount involved being over $500, plaintiff's demand had to be proved by one credible witness and corroborating circumstances (C. C. 2277). That whilst "a corroborating circumstance" would have been found in the fact of a judgment by default had defendant permitted the case to stand in that way—that "corroborating fact" was done away with by the filing of the answer, and matters had to be determined as to the sufficiency of the evidence by the general rule.

He further claims that Act. No. 31 of 1890 applies only to cases standing on default where it was anticipated that the affidavit to the correctness of the open account sued upon would be strengthened

and supplemented by the tacit admission arising from the default itself.

In support of the correctness of these views, plaintiff presses upon us the judicial admission made by the plaintiff himself in asking for the setting aside of the judgment, that it was contrary to law and rendered upon insufficient evidence. As we have before us the record in which this statement was made, that fact has necessarily come to our knowledge, but not to our knowledge in such a way that on the present inquiry it can be utilized for plaintiff's benefit. In appealing from the first judgment plaintiff restricted matters to those occurring up to the judgment; he can not pass beyond that point so far as the first judgment is concerned. That judgment was obtained, as we have said, solely on the strength of the affidavit of the president of the plaintiff corporation; it was not as absolute, direct and positive as it should have been in its terms.

The amount involved was over $500, and the case was not standing on default. We think the defendant, under the circumstances, was entitled to exact stronger evidence. We are of the opinion that the judgment itself should be reversed, but the reversal of the judgment will not carry with it the dismissal of plaintiff's demand. For the reasons herein assigned, it is ordered, adjudged and decreed that the judgment rendered by the District Court for the parish of DeSoto on the 23d day of August, 1892, in favor of the plaintiff against the defendant and appealed from herein, be annulled, avoided and reversed, the case reinstated and remanded for further proceedings according to law.

[No. 379.

THE FLORSHEIM BROS. DRY GOODS CO., LIMITED, VS. JOE WILLIAMS.

APPEAL from the Ninth District Court, Parish of DeSoto. *Hall, J.*

Goss & Parsons for Plaintiff and Appellee.

J. F. Pierson and *Chas. W. Elam* for Defendant and Appellant.

The opinion of the court was delivered by

NICHOLLS, C. J. This case is supplemental to that in the matter of the same parties which we have just decided, and for the facts involved we refer to the statement made therein.

After the plaintiff had obtained judgment in that case against the defendant, and after the term of court at which it had closed and the delays for a new trial had expired, plaintiff, upon an *ex parte* motion to that effect, caused the judgment to be set aside, the case to be reinstated as an open one, and proceeded without notice of any kind to the defendant in any of these after proceedings to take judgment against him. The defendant has appealed from this last judgment.

The proceedings taken by the plaintiff after the rendition of the first judgment and the adjournment of the court were unwarranted in law, and the judgment based upon them is null and void and should be so declared.

It is therefore ordered, adjudged and decreed that the judgment appealed from, being that rendered by the Ninth Judicial District Court for the parish of DeSoto in the matter of the above entitled suit (in favor of plaintiff and against defendant), on the 19th day of November, 1892, be and the same is hereby annulled, avoided and reversed.

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No. 362.

A. M. AND E. L. ODOM VS. ST. LOUIS SOUTHWESTERN RAILROAD COMPANY.

A passenger on a railroad train, when it stops at the station where he is to get off, and where he attempts to do so and is on the steps of the car, and the train moves ahead when he is in this situation, he is compelled to adopt a perilous alternative, to run the risk of being thrown from the train when its speed is accelerated, or to leave the train with less speed. In trying to escape imminent danger brought about by defendant's negligence, he is not guilty of contributory negligence, and the defendant corporation is responsible for its negligence.

APPEAL from the Second District Court, Parish of Bossier. *Watkins, J.*

A. J. Murff and *J. A. Snyder* for Plaintiffs and Appellees.

Alexander & Blanchard and *S. H. West* for Defendant and Appellant:

1. A claim for damages for an injury done to a married woman, living under the regime of the community, is an asset of the community, in which suit must be brought in the husband's name. 43 An. 1202; 42 An. 990; 38 An. 185; 35 An. 157; 12 An 352

   And in such a case the wife is not a competent witness. 42 An. 990.
2. In an action for damages for personal injuries, where the plaintiff has, by his own imprudence, or negligence, contributed to his own injury, he can not recover, even though defendant be in fault. 18 La. 389; 9 An. 441; 28 An. 320; 30 An. 15; 31 An. 490; 32 An. 615; 33 An. 154; 34 An. 1086; 39 An. 796; 41 An. 795; 42 An. 990; 43 An. 804; 44 An. 280.
3. The rule is well settled in this State, that where a person, in order to avoid being carried beyond his destination, jumps from a train while it is in motion, and sustains an injury, he can not recover. Damont vs. Carrollton R. R. Co., 9 An. 441: Walker vs. V., S. & P R. R Co , 41 An. 795; Olivier vs. L. & N. R. R. Co., 43 An. 804. Also original opinion of this court in Fournet vs. Morgan R. R. Co , 2 Southern Reporter, 541.
4. The court has the right to appoint medical experts and to fix their compensation. Such fee, or compensation, should be taxed as costs to be paid by the party cast. C. P. 441, 442, 462, 552; Acts of 1884, No. 19, page 25; 33 An. 1356.

The opinion of the court was delivered by

McEnery, J. The plaintiff sued the defendant company for $5000 damages for personal injuries to his wife, alleged to have been received at Mitchell's Mill, in Bossier parish, on July 4, 1892.

The petition alleges that the plaintiff "had alighted from the car, and Mrs. Odom, his said wife, was in the act of alighting therefrom; that when she had reached about the second or third step of defendant company's car, the said train, under the control and management of said company's regular employés, gave a sudden and violent jerk and began to move off; that owing to said sudden jerk, Emma L. Odom, one of your petitioners, with her infant child, whom she carried in her arms, were violently thrown from said car, her clothing was disarranged, her person exposed, and her body considerably bruised; that she received from said fall a hurt on her thigh which lasted for several days and gave her much pain; that in addition to this she received serious internal injuries from said fall, from the effects of which she has not fully recovered, and from which she suffers and may suffer for an indefinite time; that the shock to her nervous system, resulting from the dangers to which her infant child and herself were exposed, was of such extent as to

render her unconscious for a few moments and to greatly impair her health."

The defendant's answer is a general denial, and an averment of contributory negligence on the part of plaintiff.

The case was tried by a jury, and a verdict and judgment was rendered in favor of the plaintiff for $1000.

It is now well settled that contributory negligence on the part of the plaintiff is a bar to a recovery, although the defendant be in fault. 18 L. 339; 9 An. 441; 28 An. 320; 30 An. 15; 31 An. 490; 32 An. 615; 33 An. 154; 34 An. 1086; 39 An. 796; 41 An. 795; 42 An. 990; 43 An. 804; 44 An. 280.

And it is equally well established that when a passenger on a railroad train, in order to avoid being carried beyond his destination, jumps from a moving train and sustains an injury, he can not recover. 9 An. 441; 41 An. 795; 43 An. 804.

It is therefore important to ascertain whether or not Mrs. Odom contributed to her own injury, and whether she voluntarily jumped from the train while in motion in order to avoid being taken beyond her destination.

It is alleged that she was on the steps of the car in the act of leaving the car, when it moved ahead in its regular course and she was thrown from the car.

It is immaterial whether she jumped off or was thrown off if she was in the act of leaving the car when it had stopped, and the train moved ahead when she was in the act of getting off.

Some of the witnesses place her on the platform of the car, and testify that she jumped or stepped from the car platform to the small platform at Mitchell's Mills, which is a flag station. Others place her on the steps, and say that as she was in the act of getting off she was thrown to the ground by the movement of the train. On this part the evidence is conflicting and seemingly irreconcilable. We are therefore disposed to apply the rule so often announced by us, that on questions of fact, when the evidence is conflicting and the witnesses of credibility, and the testimony almost equally balanced, we will not disturb the verdict of the jury. In this case this rule can be applied with propriety, for without calling to our aid extraneous circumstances and physical facts it would be the exercise of intuitive tact and wisdom to unthread the mass of tangled testimony in the record. There is no evidence that Odom and his wife unnecessarily delayed their efforts to leave the train. They had to go some

distance where they could conveniently get to the platform at the depot. The train had signaled for a stop, and when it slowed up they moved forward to get off.

This fact is established, and also the fact that Odom got off the train when it had stopped, and had placed his bundles and turned round to assist his wife. Here the conflict of testimony begins, plaintiff's witness placing Mrs. Odom on the steps of the car, and defendant's witnesses on the platform of the car, from which, while the car was in motion, she stepped to the depot platform, two steps, and went beyond it to the ground.

Odom says as he turned to assist his wife from the train it moved off, separating him from her, and she was carried to the end of the platform, thrown from the steps against the side of the car and to the ground. We think his testimony is corroborated as to his wife being on the step of the car when it moved off. Sentell, defendant's witness places her ten feet beyond the north end of the platform on the ground when he saw her. All the witnesses place her north of the platform. This platform facing north and south, and the car being parallel with it, it is difficult to understand how she stepped to the platform and was thrown this distance to the north of it. Defendant's witnesses were not, we think, in a position to see any movement of Mrs. Odom, and when they testify they saw her on the platform they may have spoken the truth and at the instant thereafter she may have descended to the step. The witness of defendant nearest to her, in immediate proximity to her, and on whose testimony defendant places great reliance, is confused in his testimony, and makes two opposite and distinct statements in the direct and cross-examination.

We are of the opinion that the jury were correct in finding the defendant corporation negligent in moving its train when Mrs. Odom was on the car step in the act of leaving the train. She was placed in a situation by the company where she had no time for deliberation and had to choose between two modes of escape, both of which were dangerous. Error in judgment on the part of plaintiff in trying to escape imminent danger brought about by defendant's negligence does not constitute contributory negligence, even though the accident might not have happened had the act not been done. 37 An. 705.

She was on the steps of the car by defendant's invitation to her to leave the train. In this situation, with an infant in her arms, the

perilous alternative was presented to her, to remain there and run the risk of being thrown from the train when it accelerated its speed, or to step from the train before it increased its motion. It would have been dangerous for her to attempt to reach the platform of the car with the infant in her arms. Under these circumstances we are inclined to the opinion that she chose the less dangerous mode of escape. The defendant corporation is responsible for the consequences of placing of Mrs. Odom in this situation.

The evidence fails to sustain the allegations in plaintiff's petition as to the personal injury of his wife. The evidence is unsatisfactory, and at the time of the injury there was no examination made by the family physician to ascertain the condition of Mrs. Odom, owing to her modesty rather, we think, than from any desire to deceive. The examination was therefore superficial, and the family physician only visited her once. Medical experts were appointed by the court to make a personal examination of Mrs. Odom. No objection was made to this unusual application for medical experts to examine the person of the plaintiff. We will not therefore comment upon it. Objection was made and a bill was reserved to taxing the expense of the expert examination as costs to the defendant. It will not be necessary to discuss this, as the defendant will have to pay the costs. The expert testimony, as it was not objected to by defendant, may be referred to. It shows that there is "no evidence of disease existing that could not reasonably be assigned to other causes." One of these experts is the physician who first visited Mrs. Odom. Mrs. Odom was undoubtedly injured, however, to some extent.

The judgment appealed from will be amended, and the damages fixed at $500.

It is therefore ordered, adjudged and decreed that the judgment appealed from be amended by reducing the damages to the sum of $500, and in other respects it be affirmed, the plaintiff and appellee to pay costs of appeal.

ON APPLICATION FOR REHEARING.

Without granting a rehearing in this case, we will add to the decree that the plaintiff and appellee pay costs of appeal, although this is unnecessary, as the costs followed the judgment. The amendment to the judgment necessarily cast the cost of appeal on the appellee.

Rehearing refused.

45 1206
49 1730
45 1206
51 503

No. 353.

THE STATE EX REL. ABE KIRSCH VS. JUDGE OF FIRST DISTRICT COURT, PARISH OF CADDO.

The Court of Appeals, in aid of its appellate jurisdiction, has the exclusive power to issue a writ of prohibition to the District Court, which is proceeding to try a case on the docket of the Court of Appeals, and of which its jurisdiction has not been divested.

On the relator failing to get relief in that court it will be timely to invoke the supervisory jurisdiction of this court.

APPLICATION for writ of Prohibition.

Land & Land for the Relator.

Bell & Randolph for the Respondent.

The opinion of the court was delivered by

MCENERY, J. This is an application for a writ of prohibition.

It is alleged in relator's application that on an appeal to the Court of Appeals from the First Judicial District Court a judgment was rendered against him overruling his exception to the jurisdiction of the District Court and remanding the case; that said court, after the rendering of said judgment to continue its term, was adjourned from day to day by one of the judges of said court, the other being absent, and that no application for a rehearing, to which he was entitled, was filed in said court, and that said judgment had not become final, because three judicial days did not intervene between the date of the judgment and the final adjournment of the court; that the First Judicial District Court assumed jurisdiction of the case and was proceeding to try the same, and that he had filed an exception to the jurisdiction of said court, as the case was still on the docket of the Court of Appeals, as the District Court could have no jurisdiction of said case until the judgment overruling the exception and remanding the case became final.

Taking this statement as correct, it is evident that this court, at this stage of the proceedings, has no jurisdiction to grant the relief prayed for. The relator has not exhausted his remedy in the lower jurisdiction by an application to the Court of Appeals for a

writ of prohibition. Art. 104 of the Constitution vests the judges of the Court of Appeals with jurisdiction to issue writs of mandamus, prohibition and certiorari in aid of their appellate jurisdiction. This case falls under the provisions of this article, and the judges of the Court of Appeals had the undoubted power exclusively to issue the writ in aid of their appellate jurisdiction. Failing to obtain relief from that court, it will then be timely to invoke the supervisory jurisdiction of this court, if the facts warrant it.

It is therefore ordered that the rule granted herein be discharged, and the relief prayed for be denied at the cost of plaintiff in interest—the relator.

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45 1207
46 1241

No. 367.

45 1207
48 253

THE STATE OF LOUISIANA VS. JOHN LAKE ET ALS.

45 1207
117 289

The issuing of a commission to an officer who is in arrears to the State, and the giving of time by the Auditor for him to make his settlement, does not operate as a discharge to the sureties on his official bond.

The liability of the sureties on the official bond continues for a reasonable time after the term of the officer expires, for the making of a new bond. This reasonable time is fixed in this State by law. The Constitution continues all officers in office until their successors are qualified. Under Act 58 of 1877, the Governor can not issue a commission until thirty days after a general election. Under Act 19 of 1878, the newly commissioned officer has thirty days after the receipt of his commission in which to take the oath of office and file and record his bond. The liability of the sureties then continues until thirty days after the receipt of a new commission, or until a new bond is filed and recorded.

Certified statements from the books of the Auditor of Public Accounts are *prima facie* evidence of the condition of the officer's accounts with the Auditor's office.

A tax collector is properly charged with the tax rolls and licences issued to him, the whole of which he is presumed to have collected unless rebutted by legal vouchers for legal payments. 40 An. 234.

APPEAL from the First District Court, Parish of Caddo. *Taylor, J.*

John R. Land, District Attorney for Plaintiff and Appellee.

1. The sureties on the bond of an officer can not avail themselves of laches or omissions of other officers in the performance of duties imposed by law as a ground of discharge of their own liability. The ineligibility or disqualification of their principal is no defence. State vs. Powell, 40 An., p. 237, and authorities there cited.

2. The Auditor of Public Accounts is without power to extend the time fixed by law for the settlement of State Tax Collectors, who are defaulters at the moment they fail to make settlements at the time fixed by law. 31 An., p. 423.
3. Whether the State can or can not attack a quietus collaterally is immaterial in a case, when judgment of non-suit is rendered against the State, because the Auditor's certified statements show that the taxes, alleged to be covered by the quietus, are still in litigation, and, consequently, non-collectible by the defendant tax collector.
4. A tax collector who is a defaulter when commissioned by the Governor can not plead his commission as evidence that he has accounted for and paid over to the State all sums of money due up to the date of issuance of said commission. Such a commission is not a "discharge" as contemplated by Art. 171 of the Constitution of 1879; nor is it a "quietus" or "treasurer's receipt" as required by Sec. 118 of the Revised Statutes of 1870 and Act No. 85 of 1888, Sec. 78.
The tax collector is charged with sum total of the rolls and of the licenses, and it is for him to offset these by "legal vouchers" for "legal payments." 40 An., p. 237; 31 An., p. 736; 37 An., p. 718.
5. The liability of sureties under a tax collector's bond extends to such reasonable period beyond the term of office of the principal as would enable a successor, with due diligence, to be appointed and qualified. Mayor vs. Cromwell, 40 N. J. Law, 207; 40 An., p. 245; 8 Mass., 275.
Art. 161 of the Constitution ordains that "all officers shall continue to discharge the duties of their offices until their successors shall have been inducted into office;" thereby expressly extending the term of the tax collector's office beyond the next general State election.
Act No. 58 of the extra session of 1878, Sec. 40, forbids the Governor to issue commissions to newly elected officials in less than thirty days after a general election.
Act No. 19 of the Acts of 1878, Sec. 1, gives to the newly commissioned official an additional delay of thirty days within which to furnish bond.
Section 1132 of the Revised Statutes of 1870, in case the tax collector is a defaulter, allows to him ninety days after the general election within which to prove to the Governor that he is not a defaulter, or has paid the amount of his defalcation.
6. The State's claim is based upon and sustained by certified extracts from the books of the Auditor of Public Accounts. The sufficiency of such evidence is disputed by the defendants; but it is well settled that they are official records, kept under requirements of law, and as such are admissible and furnish full *prima facie* proof. 40 An., p. 237; 26 An., p 268; 12 An., p. 741.
The case of the State ex rel. Merchant vs. Taylor Daspit, 30 An., p. 112, in which it was held that the certified statements of the Auditor were insufficient, does not bear the slightest analogy to the Lake case. 30 An., p. 112.

F. G. Thatcher, Land & Land and *Bell & Randolph* for Defendants and Appellants:

1. Sureties for the fidelity of an officer appointed for a limited term are not liable for his defaults beyond the term of the appointment or commission under which the bond was furnished, and this is not extended by provisions of law to the effect that the official continue in office until his successor is qualified, and

if extended at all, it can be for only such reasonable period of time as with due diligence the successor could be appointed and qualified. State vs. Powell, 40 An. 243; Mayor vs. Arnold, 29 American Reports, 224; Building Association vs. Price, 26 Am. Rep. 703; Harris vs. Babbit Myers, Fed. Decision, 4 Vol., 255, and others quoted in State vs. Powell.

2. It is only when a tax collector comes to make his annual settlement—when he is presumed to have collected all the taxes for the fiscal year—that the whole assessment roll can be charged against him. At all other settlements he can be held to account for such amounts as is affirmatively shown to have been collected by him, and, if during that fiscal or tax year he has been reappointed or re-elected and given a new bond, his sureties on the old bond will be liable only for the amount collected by him and not accounted for before the filing of the new bond, which amount must be proved by the State. State ex rel. Merchant vs. Daspit, 30 An. 1112; State vs. Powell, 40 An. 245.

The opinion of the court was delivered by

McENERY, J. The State of Louisiana instituted this suit against the defendant sheriff and tax collector of the parish of Caddo and the sureties on his official bond as tax collector, to recover the sum of $26,194.32 for taxes and licenses collected by him and not accounted for during the years 1889, 1890, 1891 and 1892, together with the penalties and costs. The defendant made no defence to the suit.

The co-defendants of the sheriff, sureties on his official bond, answered pleading a general denial, and specially aver also that John Lake was elected sheriff as his own successor at the general election held on April 19, 1892, and that on said date his previous term of office expired, and that from said date respondents are not bound as sureties on his official bond; that he was commissioned sheriff June 26, 1892, and that his bond as tax collector for the term commencing April, 1892, was recorded July 26, 1892; that the issuing of said commission to said Lake is evidence that he had accounted for and paid over to the State all sums of money due up to that date, and that the defalcation and delinquencies of the sheriff occurred subsequent to the discharge of his sureties on the bond for the term of office commencing April 19, 1888; that said Lake, sheriff, settled with the State for all taxes and licenses for the years 1889 and 1890; that if said Lake was indebted to the State when his commission issued in 1892, that the Governor and State Auditor, by issuing said commission and giving time to said Lake without the consent of the respondent, discharged them as sureties on his official bond as tax collector.

There was judgment in favor of the State, and the respondents, sureties on the bond of Lake as tax collector, appealed.

John Lake was elected sheriff in 1888, and on the 20th day of June following filed and recorded the bond for his official conduct as tax collector. The respondents are the sureties on this bond. On the 19th day of April, 1892, he was again elected sheriff, and his commission issued on the 21st of June following. He qualified on the 15th day of July, and on the 26th of July filed and recorded his official bond. On the 10th of September, 1892, he was succeeded in office by the present incumbent.

The district judge dismissed as of non-suit the claim for taxes for 1889 and 1890, and therefore the taxes for 1891 and the licenses for 1892 are involved in this appeal.

It will hardly be necessary to comment on the position taken by respondents that the issuing of the commission to Lake by the Governor, and an extension of time, if it had been proven, by the Auditor, had the effect in the first instance of releasing him from indebtedness to the State, and in the second, of canceling his official bond and discharging the sureties. The defalcation made him ineligible to office, but if he entered upon his official duties this did not concern his sureties on his official bond, who were on said bond, vouching for his honesty and fidelity and faithful discharge of duties. An official may be ineligible to office, and yet, until his ineligibility has been drawn in question and his successor appointed, he is both a *de jure* and *de facto* officer.

The sureties are in no way concerned about the title to the office or the qualification or disqualification of the officer. 40 An. 287.

The Auditor of the State has no authority to grant an extension of time to the tax collector to make his settlement. The time for these settlements is fixed by law. The sureties on his official bond went on it with a knowledge of the law; that their principal had to account for money collected for taxes and licenses at stated times. No default of any official excuses the neglect in another.

It has been held that the liabilities of sureties on an official bond should be held to extend to a reasonable period beyond the term of office for his successor with due diligence to qualify. Cases cited in State vs. Powell, 40 An. 245. But in this State the "reasonable" period has been fixed by law.

Art. 161 of the Constitution says: "All officers shall continue to

discharge the duties of their office until their successors are inducted into office." It is under this article competent for the Legislature to fix the period within which an officer shall qualify. Two acts of the Legislature designating this period were in existence when this article of the Constitution was adopted, and being in accord with it, the acts were continued in force. The term of the office is fixed at four years. This term must necessarily commence from the date of his commission and qualification under it as no commission can issue to him under the Act 58 of 1877, extra session, the Governor being prohibited from issuing a commission to him before the expiration of thirty days. Act 19 of 1878, Sec. 11, provides "that all State, district and parochial officers of this State, whether elected or appointed, shall be required within thirty days after the receipt of their commissions to take the oath of office prescribed by law, and give bond when bond is required, and cause the same to be filed in the proper office in the manner and as required by law. The bond of Lake as tax collector was given with reference to existing law. His bond, therefore, continued in force from the day of its execution until his successor received his commission and qualified within the thirty days as required by Act 19 of 1878.

The bond was executed on the 20th of June, 1888. His commission on his re-election was issued 21st June, 1892, and he took the oath of office 15th July, 1892, and filed and recorded his bond on the 26th of July, 1892. Under the act the oath of office must be taken and the bond filed within thirty days.

The new bond was filed more than thirty days after the issue of the commission, but if we make allowances for necessary delays of mailing and transit we presume it was filed within thirty days after the receipt of his commission. The record does not show when the commission was received. For the purposes of this suit this date, if proximately correct, will answer all purposes for the decision of this case. If the sheriff fails to take the oath and give the required bond the office *ipso facto* becomes vacant, and necessarily the sureties on his bond are discharged. State vs. Powell, 40 An. 245.

The sureties on the official bond of an officer therefore continue their liability as such until the officer gives the bond within the thirty days from the receipt of his commission, or until the thirty days expire, when the office becomes vacant.

Sec. 1132, Revised Statutes, giving a sheriff elected ninety days to

prove to the satisfaction of the Governor that he is not a defaulter in order to authorize the issuing of a commission to him, has no application to this case.

It is not difficult to ascertain the amount due the State for licenses and taxes by the tax collectors. Throughout the State, except the parish of Orleans, tax collectors are required to render their accounts to the Auditor within the first ten days of April, October and January, and to make their final settlements with the auditor and police jury of each parish in the ten days after 20th of July of each year. At each settlement they are required to make an oath that the settlement contains a faithful account of all taxes collected, and the amount received, if any, from licenses to persons pursuing any trade, profession or taxed occupation. Sec. 76, Act No. 83 of 1888.

He is charged with the tax rolls and the blank licenses issued to him. Each quarterly statement must be accurate and complete, the tax collector accounting for money received on account of the State, and the tax roll and license list is credited with the amount collected and paid over. On the final settlement he must account for the entire tax roll and license list, being credited with the blank licenses returned and the credits to which the law entitles him on the tax roll. Failing to return the blank licenses he is chargeable for those not returned as collected, and failing to obtain the proper credits authorized by law on the tax roll, he is charged with the taxes which he does not account for on the delinquent list.

He is a defaulter when he fails to make the settlement quarterly, as required by law, and he and the sureties on his official bond can be proceeded against at once and summarily.

The final settlement of the tax collector should have been made with the Auditor within ten days from the 20th of July, 1892, when a quietus would have issued to him. He did not make this final settlement and obtain a quietus.

For the taxes of 1891 the defendants have failed to show that their principal, Lake, settled according to law for the taxes of 1891, and he is therefore charged with the tax roll unaccounted for, and also for the licenses issued to him and not returned.

When the sheriff and tax collector surrendered the office or resigned it, he was compelled by law to deliver to the recorder of the parish a list of all unpaid or delinquent taxes. Thus it will be seen that it was quite easy for the sureties to exhibit the list of

unpaid taxes and the delinquent tax-payers since the tax collector obtained his last quietus or from the date of his new bond. The burden of proof is on them to show the credits to which the tax roll is entitled.

The tax collector is therefore chargeable with the amount on the tax roll which he fails to have deducted by reason of inability to collect the tax. There is no evidence showing that any part of the balance due by him on the tax roll of 1891 was collected by him after he qualified by filing his official bond in July, 1892, at which time his sureties were discharged.

Blank licenses were issued to Lake from January to August, 1892, amounting to $15,900. He accounted for $3074, leaving $12,826 unaccounted for.

Sec. 2 of the License Act of 1890 says all licenses shall be due and collectible the first two months of each year, and all unpaid licenses shall become delinquent on the first day of March of each year. He should have returned the delinquent licenses on his first quarterly settlement. It is to be presumed that he obeyed the law and collected licenses when they were due and reported the delinquents. The record shows that in October, 1892, he returned $1073.50 blank licenses to the Auditor, and on June 21, 1892, he paid on account of licenses $2000. No collections of licenses are shown to have been made after he qualified as his own successor in office. Had this been the case it was a matter of proof, the burden of which was on the defendant sureties. That this was in the ability of the sureties to prove is shown by the provisions of Sec. 2 of the License Act of 1890. From the delinquent list of license payers it would have been easy to show the amount paid after they became delinquent, and by whom paid and at what time.

The whole case on the merits against the defendant sureties may be summed up in a few words.

The tax collector was charged with the tax roll of 1891. He defaulted on his final settlement, and was indebted to the State for the taxes not accounted for. His sureties became liable at once. Act 83 of 1888, Secs. 39, 76, 77 and 78.

The tax roll shows a balance due to the State of $10,685.81. The burden of proof is on the sureties to prove that this balance was reduced by collections on said roll, made after they were discharged.

Blank licenses were issued to him for $15,000. The licenses were

due on 1st March, and after that date the license tax-payer became delinquent, and the sheriff and tax collector should have accounted for license taxes in his settlement with the Auditor in the first quarterly settlement thereafter. Failing to do so he was a defaulter for the amount of licenses issued to him and unaccounted for, and he and his sureties at once became liable for the balance. Revenue Act of 1888; License Acts of 1886, 1890.

After he failed in making settlements on the day fixed by law he *ipso facto* became a defaulter, and the burden of proof is on the sureties to show that the balances claimed by the State on the tax roll and for licenses were collected after their release on his bond. No such showing has been made. 31 An. 736; 37 An. 718; 40 An. 237.

The case against defendants has been fully made out. The full *prima facie* showing made by the State by certified extracts from the Auditor's books, showing the condition of the sheriff's accounts, has not been rebutted by defendants by legal vouchers for legal payments or offsets. 40 An. 234.

Judgment affirmed.

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45 1214
47 204

No. 373.

MERCHANTS AND FARMERS' BANK VS. THE HERVEY PLOW CO., LTD.

FIRST NATIONAL BANK, THIRD OPPONENT.

Mortgages can be executed to secure an amount to become due.

The authority of an officer to bind a corporation in the management of its ordinary business, may be fairly implied.

There being no proof nor allegation of fraud or unfair dealing, the plaintiff, a third person, can not require an imputation of payment between creditor and debtor to be changed.

APPEAL from the First District Court, Parish of Caddo. *Hall, J.*

Alexander & Blanchard and *Land & Land* for Plaintiff and Appellant.

Wise & Herndon for Third Opponents and Appellees.

The opinion of the court was delivered by

BREAUX, J. The plaintiff, a judgment creditor of the defendant for $2500, caused certain property of the defendant to be seized and sold to pay its claim.

On the day of sale the First National Bank filed a third opposition, claiming the proceeds of the real estate.

The opponents were the payees of a promissory note for the sum of $5000, with interest from the 26th day of September, 1891.

This note was secured by mortgage of that date on the property seized.

The balance claimed by the opponents on this mortgage is $3829.91.

At the sale, the property was adjudicated to the First National Bank, third opponents, for the price of $4000.

The plaintiff, in answer to opponent's petition of opposition, denies the existence of their mortgage claim, and specially pleads that if it ever existed, it has been extinguished.

At a meeting of the directors of the defendant company on the 25th day of September, 1891, a resolution was adopted authorizing the president of the company to execute a mortgage in favor of the First National Bank of Shreveport to secure the payment of the sum of "$3756 now due, and the further sum of $1300, to become due upon the real estate and plant of the company," payable one day after date.

He was also authorized to pledge to the bank as further security the unpaid assessments due by the stockholders to the company.

The secretary and general manager of the company testified that the defendant received the amount of the mortgage, as set forth in the deed of mortgage.

He also testifies that "after the note and mortgage was executed, I asked Mr. Jacobs, cashier of the First National Bank, to receive these amounts that I collected other than the assessments pledged to the bank, simply for the convenience of the treasurer, to carry on the current business of the company, and not to be applied to the payment of the secured debt. He consented to do so, and I deposited the amounts with that understanding. The amounts deposited, other than the assessments, were drawn out by the treasurer of the Plow Company. This was so agreed when the deposit was made by me, otherwise I would not have put them there. The Hervey Plow

Company had no other resources than collections I made for them, as stated, with which to carry on the business."

The cashier of the First National Bank says that he is acquainted with the business transactions of the Hervey Plow Company, Limited, with his bank.

That the balance claimed by the bank is the amount due it on the mortgage after allowing the Plow Company all proper credits.

He says: "At the date of the execution of the mortgage and note for $5000, the amount then due this bank by the said company was $3756.98, and in accordance with our agreement and mortgage our bank advanced additional sums, aggregating, October 25, $5034.02.

"For their convenience they desired to make deposits, but with the distinct understanding that they should be drawn out for the conduct of their business, and that I should not apply deposits to the payment of the note and mortgage, except, as before stated.

The acting president of the company knew that such an agreement was indispensable to the work of the company. Without it the company would have been compelled to stop.

The amount collected on assessments pledged was $1434.77.

Two separate accounts—one "debit," the other "credit," were introduced in evidence to show the condition of the open account between the defendant and opponent. They are unexplained by any testimony.

The authority of the secretary and manager to enter into an agreement with the First National Bank is denied. The agreement was an incident of the service due by him to the company. It was in the interest of the company, with the knowledge of the members and directors, and binding without proof of an ordinance adopted to that effect.

Plaintiff's counsel, in their brief, state "that the balance sued for is made by charging the Plow Company under date of December 18, 1891, with demand note $6000."

That "there is no testimony explaining this item," and that "it is patent that if the sums collected on assessments and amounting to $1434.77 are credited in this account, they have been applied wrongfully and illegally on the 'demand note,' which was not secured by the mortgage and pledge."

There is no evidence in the record that this amount was credited on the "demand note."

There is evidence that it was credited on the mortgage.

In the absence of statements clearly setting forth credits and debits and establishing balances, and in the absence of any testimony showing that it was credited differently than stated by plaintiff's witnesses, the court will not disturb or change the result.

The bank having agreed to receive the deposits of the Hervey Plow Company subject to its checks, and having consented not to apply such deposits to the credit of the mortgage and pledge, was absolutely without right to such a credit.

In accordance with that agreement it became a depository of the money, and could not transfer it to its own account in satisfaction of the secured indebtedness.

The agreement was legal and unobjectionable. C. C. 2163.

With the consent of the debtor the deposits were placed to the credit of other claims, needful, the witness states, to the plow factory's operations.

There is no proof nor allegation of fraud or unfair dealing; the plaintiff, a third person, can not require the imputation to be made to a different debt.

The rules of imputation of payments were laid down with admirable clearness in a case *in pari materiæ*, that of Bloodworth vs. Jacobs, 2 An. 25, in which it was held that the receipt in which the imputation is made becomes irrevocable unless there has been surprise or fraud.

The disposition of a fund depends upon the agreement or course of dealing.

"If a factor receive a fund for a particular object under instructions from his principal, no law and no principle of morals will permit him to apply it to any other; and how any different appropriation of it can be required from him by a third person, it is difficult to apprehend, *grave est fidem fallere*. Take a very common case. The current expenses of a plantation must be paid, a man's family must be supported; and if the factor agree to pay bills or furnish money for these purposes to a planter, and of the proceeds of a crop consigned to him, can he, after procuring the consignment, apply the proceeds to the extinguishment of a previous debt, and set at nought the very condition on which the crop was consigned to him. We have not considered the law to be so."

The same rule applies to a depositor of money. The banker or

ordinary creditor has no right to set up any claim inconsistent with the terms of agreement.

The judgment appealed from is therefore affirmed at appellant's costs.

45 1918
45 1302

No. 357.

THE STATE ON THE RELATION OF JAMES HENRY JONES VS. JUDGE OF THE NINETEENTH DISTRICT COURT.

The trial judge will not be ordered to sign a bill of exception which contains a statement that witnesses for the defence testified exonerating the accused, the judge averring in his return to the writ of mandamus that the statement does not comport with the facts proven on the trial, and that he is willing to sign a proper bill.

APPLICATION for Mandamus.

Todd & Todd for the Relator.

The opinion of the court was delivered by

PARLANGE, J. This is a mandamus proceeding by which relator seeks to compel the judge of the Nineteeth Judicial District Court to sign a bill of exception which relator, through his counsel, reserved to the refusal of the district judge to give certain charges to the jury which tried relator for murder. Sentence of death has been passed on relator, and his appeal from the same is on file in this court.

The respondent judge admits in his return to the writ that he refused to sign the bill of exception. But he states that "he was and is still willing to sign said bill, and has so stated to counsel for the accused, provided the wording of the seven first lines thereof be so amended as not to force him to admit facts upon which he disagreed with" relator's counsel. The wording objected to by the respondent judge is as follows:

"Be it remembered that on the trial of this case, after certain evidence on the part of the State, implicating the accused who was present at the homicide, in the killing, had been adduced, and after witnesses for the defence had testified exonerating the defendant from any complicity in the affair, the following charges were asked for," etc.:

The district judge objects particularly to the words: "And after witnesses for the defence had testified exonerating the accused from any complicity in the affair." He avers that he can not sign a bill containing such a statement, for reasons which he sets out at length, but mainly because the statement "does not comport with the facts proven on the trial," and because "counsel can not ask the judge to admit that the evidence adduced on the trial exonerated the accused."

We do not understand, as counsel for relator express apprehension in their brief, that the respondent judge denies that there was any contention whatever as to the guilt or innocence of relator. We understand that the district judge objects to signing a bill of exception which states: not that there was testimony tending to exonerate or for the purpose of exonerating the relator, but exonerating him. We feel assured that the district judge will state that there was a contention.

It is clear that it is the duty of the district judge to sign a bill of exception which will show his refusal of the charges. This refusal he admits. We do not understand him as refusing to sign a bill of exception showing the refusal, but on the contrary as averring his readiness to sign the bill of exception brought up in this case, provided the words to which he objects are first stricken out.

We have been referred by the counsel for relator to the decisions of this court reported in 38 An. 536–789, State vs. Tucker, and to other cases. The decisions quoted are correct, but they do not apply to the instant case. That a defendant in a criminal case, in order to preserve a point of law and to enable this court to pass upon the applicability of the point of law, may state the contention in his bill of exception and that he may state the contention in the manner shown by the authorities quoted, is a perfectly correct proposition; but it is not the proposition involved in this case. This court is now asked to compel the trial judge to sign a bill of exception which states the force and effect of testimony heard by the jury, and to require him to certify that certain witnesses on behalf of relator "testified exonerating him from any complicity in the affair."

Probably the counsel for relator did not intend to make the statement as broad as it appears on the face of the bill of exception; but the bill must speak for itself.

Relator prays that the district judge be ordered to sign the par-

ticular bill of exception in question in its present form. It is evident that we can not so order. Nor can we, in this proceeding, order the district judge to sign a bill framed in accordance with the views we herein expres. In mandamus proceedings there can be no variance between the relief asked and the relief granted, and if the court can not grant the relief specified in the alternative writ, it must refuse any. Besides, the district judge has not refused to sign such a bill as would be held proper under the views we herein express.

Mandamus refused and proceedings dismissed at relator's costs.

No. 383.

J. N. LEWIS VS. N. M. BOYET ET AL.

Under Art. 898, Code of Practice, relief will be granted only from the effects of such mistakes, omissions and similar irregularities as arise without fault on part of appellant.

Where the transcript is grossly defective the appeal will be dismissed.

APPEAL from the Justice of the Peace for the Fifth Ward, Parish of Webster.

Drew & Stewart for Plaintiff and Appellant.

L. K. Watkins and *J. E. Reynolds* for Defendant and Appellee.

ON MOTION FOR CONTINUANCE.

The opinion of the court was delivered by

PARLANGE, J. The transcript in this cause was filed in this court on October 25, 1893. On the same day the defendants and appellees filed a motion to dismiss the appeal for the reasons that the return day was not fixed according to law; that the case was tried in ample time for appeal to this court in October, 1892, and that the return day was illegally fixed at the suggestion of the plaintiff and appellant; that the transcript is defective for want of copies of the appeal bond, and other papers, and that the certificate to the transcript is not in due form. The motion to dismiss has not been submitted, and on this day the appellant has moved for a continuance of this cause,

and that the lower court be ordered to send up a correct and complete transcipt by the next term of this court. The appellant does not even allege that he is not in fault.

Under Art. 898 of the Code of Practice, in which have been embodied acts for the relief of appellants in cases of diminution of the record, this court will grant relief only from the effects of such mistakes, omissions and similar irregularities as arise without fault on the part of the appellant.

More than a year has elapsed since the rendition of the judgment in the lower court. A term of this court, other than the present term, has been held since then. The transcript was not filed in this court until the third day of the present term. The transcript is grossly defective. In fact, it is no transcript. Under the circumstances of this case, we hold that the appellant is not entitled to the relief he asks, and his motion for a continuance and for an order to the lower court to send up a correct and complete transcript, is overruled and refused.

ON MOTION TO DISMISS THE APPEAL.

The defendants and appellees have moved to dismiss the appeal in this cause. The transcript is grossly defective. It contains neither order of appeal nor appeal bond.

It is therefore ordered that the appeal be dismissed at the costs of plaintiff and appellant.

No. 381.

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L. L. CROW ET AL. VS. B. M. MANNING, SHERIFF, ET AL.

The question is not one of constructive service *vel non*, but whether the wife, who is out of the State, can be brought into court to respond in a civil suit by citation on her husband, an absentee who happens to be temporarily in this State.

The service, in so far as she is concerned, being personal, the court was without jurisdiction.

The husband who joins and aids his wife in committing a tort in an illegal sequestration proceeding instituted to recover her paraphernal claim is bound *in solido* for the damages occasioned.

A sheriff acting under the direction of a court of competent jurisdiction and carrying out its orders is not responsible in damages.

Prescription runs from the day the injury or damage was sustained. Damages for expected profits must be clearly established.

APPEAL from the Second District Court, Parish of Bienville. *Watkins, J.*

L. K. Watkins, *J. A. Dorman* and *Drew & Stewart* for Plaintiffs and Appellees.

W. U. Richardson, *B. P. Edwards*, *J. E. Reynolds* and *A. J. Murff* for Defendants and Appellants.

The opinion of the court was delivered by

BREAUX, J. Mrs. Annie P. Mower, authorized, assisted and joined by her husband, Calvin R. Mower, domiciled in the State of Illinois, represented by Emile C. Drew, of Bienville parish, as attorney in fact, brought an action against T. Martin and caused property to be sequestered.

The indebtedness to her by the defendant in the suit, T. M. Martin, was $600, due on trees sold to the defendant in that case, and $190 for timber she claimed was destroyed by him.

She made the usual allegations for a writ of sequestration, and described the property she desired to have sequestered, and which the sheriff sequestered and took into his possession on the 10th day of December, 1891.

On defendant's motion this writ was dissolved for the reason that she had no privilege that would sustain a sequestration.

The property sequestered was claimed at the time by a partnership, of which H. S. Crow, Z. Martin, L. L. Crow and T. M. Martin were the members.

The partnership was dissolved; the three partners who succeeded to the rights of the partnership brought suit against the sheriff who executed the writ of sequestration, against Mrs. Mower and her husband, and against E. C. Drew, agent, for damages *in solido* by the illegal sequestration.

One citation for Mrs. Mower and husband was served on E. C. Drew, agent.

Another addressed to the same parties was served on C. R. Mower, the husband, personally, who was temporarily in the parish on the 10th day of December, 1892.

They, Mower and wife, subsequently, interposed the plea of want of jurisdiction *ratione materiæ* to try a cause against them, being absentees, which was overruled.

They also interposed the plea of estoppel and pleaded the prescription of twelve months, also no cause of action.

The answer of the defendants is a general denial.

The judgment of the District Court condemns the defendants, B. M. Manning, sheriff, C. R. Mower and P. P. Mower *in solido* in the sum of $5004.25, with legal interest from judicial demand.

From the judgment they appeal.

The sheriff having made service of the citation to Mrs. Mower by handing it to her husband the question arises as to whether it is such a service as binds, and is legal as to her, an absentee.

The service upon Drew, agent, is illegal, for he was without authority to represent her in the suit.

It therefore remains for us to determine the legal effect of the citation to Mrs. Mower served upon Mower, husband.

The absentee may be cited in answer whenever he is found within the limits of the State.

The service was legally made upon the absentee Mower, in so far as he is personally concerned.

If the petition and citation be directed against a married woman the service may be made by delivering it to the husband.

A defendant who is an absentee may be brought within the court's jurisdiction by personal service.

The service is personal when delivered to himself.

The wife was an absentee, and no personal service was made as to her.

The husband's authority was sufficient to bind her to respond in so far as relates to a citation pure and simple.

In this case if it be decided that the service is legal against the wife it will have the effect of constructively bringing her into court, and of conferring jurisdiction.

The condition under which jurisdiction arises is personal presence.

By the presence of her husband she is not present personally nor constructively.

One of the elements to confer jurisdiction is lacking—the service upon the wife personally.

The personal service upon the husband is not a personal service as to her.

The case of Pennoyer vs. Neff,—U. S.—, to which our attention is invited, has no bearing.

The question is not one of constructive service *vel non*, but whether the wife, an absentee, can be brought into court by citation on her husband, absentee, who happens to be temporarily in this State.

The service, in so far as she is concerned, not being personal, the court was without jurisdiction.

The plea to the jurisdiction invoked as an admission of citation is not such an admission as waives citation, it having been interposed by an absentee.

As against her, citation is the basis of the action. The plea as presented covers both want of citation and jurisdiction.

The court was without jurisdiction because the defendant had not been legally cited.

The amount claimed being an alleged paraphernal right of the wife, the husband having joined his wife to authorize and assist her in the suit, the defendant contends that plaintiffs have no right of action against him.

Every person is responsible for the damage he has occasioned by his negligence or imprudence.

If defendant's wife has committed a trespass, a tort, as is alleged, and thereby has caused damages, he who has [authorized, joined and aided in the act is also bound.

He joined in the petition and all subsequent proceedings of sequestration. It is true that had he declined to authorize his wife she possibly would have obtained the authorization of the court.

But the court, without reference to the character of the action or the nature of the claim, would have granted the authority.

She would have appeared before the court *quoad* the suit as a *femme sole*.

The court would have been indifferent and impartial as to the result]

The husband is an active party to the suit, with full knowledge of the character of the claim, and persisting in the trespass by continuously giving authority and consent to the trespasser, and has taken an active part in the proceedings from beginning to end.

Those who commit torts or assist in their commission are bound *in solido* for the damages occasioned. 15 An. 583.

It is also sought to hold the sheriff responsible.

He was ordered to sequester certain property.

It is described with particularity. It was not left to him to sequester the property of the defendant, with some discretion to determine whether or not certain property belonged to the defendant or to a third person.

By a court of competent jurisdiction he was commanded to sequester property described and referred to in the order.

In Brainard vs. Head, 15 An. 490, this court held: "A sheriff has no legal right to question either the facts or the law of any decree, order or judgment rendered by a court of competent jurisdiction. His duty is to obey and execute the lawful mandates of the court, and in the discharge of this duty he is justified and protected by the law, and as a consequence can not be held liable in damages."

The duty was as pronounced and as imperative in the case at bar.

Those who were instrumental in obtaining an illegal order may be held in damages.

But not the executive officer who only obeyed the mandate of the courts.

A plea of estoppel was interposed, based on an alleged consent of one of the defendants, H. L. Crow, to the issue of the writ of sequestration and on an agreement of another of the defendants.

The facts urged as an estoppel against the former, H. L. Crow, are that he held a conversation with Drew, agent for Mrs. Mower, in which he expressed the desire of supplanting Martin, as party to the contract with Mrs. Mower for trees to be sawed at their sawmill.

That upon this conversation the agent sued out the writ of sequestration; that Crow pointed out the property to be sequestered, and that his copartner was appointed the sheriff's keeper.

The agreement that the defendant avers is denied.

The testimony upon the subject is contradictory and irreconcilable.

The purpose of the agreement and the conflicting testimony are such, that the rights of the parties will not be considered affected by them in any manner.

Such an agreement, if entered into, does not recommend itself to the instrumentalities of the courts for enforcement.

That one of the partners was appointed keeper, under the writ of sequestration, and retained the keepership during thirty-three days, is not a waiver of any real right he may have had on the property.

It is not similar to the owner who points out his property to be sold. In this case, during the pendency of the suit, he consented to act as keeper.

In so far as relates to T. M. Martin, another defendant, the facts are that in 1891 he made a contract with C. R. Mower for timber of the lands of Mrs. H. P. Mower, in consideration of the delivery to her of one-tenth of all the lumber sawed.

This contract expired about the time that the sequestration was issued.

It is in evidence that Zach. Martin, H. S. and L. L. Crow entered into an agreement in May, 1891, by which they became jointly interested in his timber contract with Mrs. Mower.

Under this agreement they erected a saw-mill on the lands of Mrs. Mower, and sawed timber from her land, from June, 1891, until December 10, 1891. During that time the tenth stipulated for Mrs. Mower was not paid.

On the last mentioned date Mrs. Mower instituted suit and sued out a writ of sequestration, claiming an amount due for the tenth of the lumber.

At the expiration of thirty-three days Mrs. Mower bonded the property and delivered it to T. M. Martin, who, with Zach. Martin, operated the mill until the sequestration was finally dissolved.

In 1892, Martin and Drew, agent, entered into an agreement, reciting that, whereas, Drew, agent, had executed a forthcoming bond for the release of the property sequestered in the case of Annie P. Mower and husband vs. T. M. Martin, they agreed that he (Martin) should have possession of and use the property sequestered.

That the suit was to remain in court until an accurate statement could be furnished of the property, and his indebtedness fixed.

He abandoned all claim for damages and lumber.

The previous existing contract for timber from Mrs. Mower's land was acknowledged and renewed.

In June of that year the sequestration was dissolved on the ground that Mrs. Mower had no privilege to sustain a sequestration.

No reference was made to this agreement.

In June, 1893, the partnership affairs of the firm of Martin & Crow was settled, T. M. Martin withdrew from the partnership, and the remaining members of the partnership were subrogated to his rights.

It is in place to now state that T. L. Martin, having waived all right to lumber and damages, he had none to transfer, and as to this claim plaintiffs are absolutely without a cause of action.

The plea of prescription is also interposed, viz.: the prescription of one year.

Twelve months and three days had elapsed from the date of sequestration to the date citation was served.

Prescription runs from the day on which the damage was sustained. C. C. 3637.

The suit is for damages for wrongful seizure of property.

The loss and damage caused to plaintiffs by the seizure made on the 10th day of December, 1891, was presented. Service was made on the 12th day of December, 1892.

Plaintiffs contend that the damages were accruing from day to day, and only prescribed from the time it actually occurred. This is indisputable as to the damages to the mill and other property if any occurred from day to day after the seizure.

Suit was not brought for the lumber which was sequestered, but for damages caused by its seizure.

The damages caused on the 10th day of December, 1891, are prescribed, being for damages in the loss of lumber taken that day.

It remains for us to determine whether any damages have been proven as accruing to the plaintiffs, personally.

The property on the day it was sequestered was valued by the sheriff and the appraisers at $2125.

One of the partners testifies that the mill shed leaked, and as a result the operations of the mill were interrupted in rainy weather, which was frequent at the time; the roads were in bad condition and heavy, transportation over them was difficult, lumber was not in demand and the profits small.

Disinterested witnesses testify that the mill would not have been operated half the time.

The damages claimed are entirely for profits the parties think could have been realized.

The whole case depends on varying estimates.

The records do not disclose that any profits were realized just preceding the sequestration or afterward.

There is proof, but it does not impress us as showing profits—only the reverse.

The possible profits of an enterprise must be proven with some degree of certainty, and should not be made to depend upon gross estimates of possible revenues and of possible expenses without reference to details and particulars.

The contingencies attending profits or the possibilities of losses forcibly present themselves on an examination of the testimony.

We have earnestly applied ourselves to find damages proven.

The evidence is not such as to establish the claim made.

Were we to follow the estimates of interested witnesses a decree would be entered for a large amount without testimony satisfactorily showing the actual cost of operating a mill and of the possible price of its products in the markets.

It is therefore ordered, adjudged and decreed that the judgment appealed from be annulled, avoided and reversed, and that plaintiffs' demand be rejected and their suit dismissed at their costs in both courts.

ON APPLICATION FOR REHEARING.

McENERY, J. We have carefully and patiently examined the record in this case to verify the facts stated in the opinion. We find only one error—the date of the citation on P. Mower. That error was in the confusion of dates resulting from the certificate of the clerk to the citation, which came up separately, and the return on the citation by the sheriff. But this error can have no effect on the merits of the case. The facts fully justify the decree rendered.

Rehearing refused.

No. 365.

A. B. CARUTH AND WIFE VS. TEXAS & PACIFIC RAILROAD COMPANY.

Same syllabus as in Odom vs. Railroad, decided this term.

APPEAL from the Ninth District Court, Parish of De Soto. *Hall, J.*

Geo. E. Head, Lee & Liverman and *J. C. Egan & Son* for Plaintiff and Appellant:

The defendant company having plead contributory negligence the burden of the proof is upon them to show it 15 Wallace, 406, 407; 93 U. S. 391; 40 An. 417.

Contributory negligence can not be set up as a defence when such alleged negligence was the result of tremor and excitement, produced by the defendant's misconduct, or when the latter's negligence puts the plaintiff to a sudden election between acting as he did or submitting to a grave inconvenience. 2 Redfield on Railways, Sec. 194, *et seq.*; Wharton on Negligence, Secs. 395, 377; 2 Thompson on Negligence, p. 1174; Lehman vs. Railway Company, 37 An. 708.

It is the duty of the railway carriers to provide safe modes of ingress and egress to and from their cars; to provide sufficient lights at their stations where passengers take or leave their trains at night; to have its stations open and lighted, and its servants ready for the accommodation of those who may wish to leave its trains or depart by same. For neglect of said duty resulting in injury to passengers the carrier is responsible. Thompson on Carriers of Passengers, p. 708: Wharton on Negligence, Secs. 652, 644; Moses vs. Railway Company, 39 An. 653, 4, 5 and 6; Penniston vs. Railway Company, 34 An. 777; Lehman vs. Railway Company, 37 An. 705; 37 An. 648, 698.

Passengers have a right to proper and sufficient time for alighting from a train at their places of destination, and it is gross negligence to start a train while they are on the steps of a car platform in the act of alighting. They are responsible to injuries occasioned to passengers by such negligence. 37 An. 707.

Where a passenger is on the steps of a car platform in the act of alighting therefrom and the conductor starts the train without warning and the passenger is precipitated to the ground by the sudden jerking motion of the train and injured, such conduct shows a reckless disregard by the carrier for the safety of its passengers and a gross neglect of its duty to them, and they are responsible in damages for the injuries received by passengers occasioned by such conduct. 35 An. 202.

Two thousand dollars damages is not sufficient in a case of this kind, taking into consideration the following elements of damages, which are proper in estimating and assessing the same: (1) Expenses of surgical and medical attention and nursing. (2) The bodily pain according to its degree and duration. (3) Bodily injury, taking into account the loss of time the extent and probable duration of the injury, its effect on the health; the mental and physical powers; the capacity for labor, and the earning of money. (4) The probable duration of the injury, as to whether temporary or permanent. Lacey's Digest Railway Dec., p. 172; Nos. 23, 24, p. 173, Nos. 43, 44, 46, 47, Sedgwick; Munsun Dam., p. 243 (note).

The amount of damages in this case is totally insufficient where the evidence shows that the injuries are permanent, and where a vigorous and healthy young wife is reduced by them to a chronic invalid.

Wise & Herndon for Defendant and Appellant:

1. Plaintiff must make his case certain. The burden of proof is on him.
2. A railroad company is not liable to a passenger for an accident which the passenger might have prevented by ordinary attention to her own safety, even though the agents in charge of the train are also remiss in their duty. 30 An. 15; 32 An. 615; 33 An. 154.
3. One who passed out of a railway car and got upon the platform thereof to step or jump from the car while it was in motion can not recover for injuries suffered in consequence thereof, even though he had reached his place of destination, and the train which had previously stopped to permit passengers to alight, ead not so stopped for a reasonable length of time. 6 Am. and Eng. Ry. Cases, 379; 41 An. 795; Fournet et al. vs. Morgan's L. & T. R. & S.S. Co., July term, 1891, of ;his court; see Southern Reporter for November, 1892, p. 541.
4. It is contributory negligence for a passenger to leave a car while it is in motion, and in an action by a passenger to recover damages for injuries received while so alighting, the court should so instruct the jury. 33 Am. and Eng. Ry. Cases, 444.
5. Passenger.—Duty of conductor to assist passenger to alight. No duty rests upon the conductor of a railway train to assist a female passenger to alight from the car. 31 Am. and Eng. Ry. Cases, 45; 33 Am. and Eng. Ry. Cases, 520.
6. Duty of conductors in starting train as to passengers alighting. The conductor of a railway train is only required, after having the station announced, to stop the train, and hold it such reasonable time as will permit the passengers to alight in safety. It is not his duty "to know" that a passenger has left the cars before he gives the signal to start. 31 Am. and Eng. Ry. Cases, 45; 35 Am. and Eng. Ry. Cases, 520.
7. Excessive and vindictive damages will not be allowed. 11 An. 292; 40 An. 64.

The opinion of the court was delivered by

McEnery, J. The plaintiff brought this suit to recover damages against the defendant company for personal injuries inflicted upon his wife when she was leaving defendant's train at Mansfield Junction.

The answer is a general denial, with a plea of contributory negligence on the part of defendant.

The case was tried by a jury and a verdict rendered in favor of plaintiff for $2000 damages. The defendant appealed from the judgment rendered thereon.

The plaintiff was a passenger on defendant's train, and left the same at Mansfield Junction.

The evidence establishes the following facts: That the train was behind schedule time and stopped at the Junction a very short time —not sufficient for passengers to get on or off with safety; that Mrs. Caruth used due diligence in the short time allowed her in leaving the train; that when she was on the car step, in the act of alighting, the train started and she was injured by being thrown, as the plaintiff declares, "between the fender and the end of the car, struck in the back and pitched forward."

The testimony introduced to contradict this is negative in character. The train was in motion when the witness, Yarborough, assisted her from the step of the car, and it is probable that the car moved before he assisted her and inflicted the injury upon her. It is in evidence that she had received no fall and that she had been placed in no situation to inflict an injury upon her before she entered defendant's car. Immediately on reaching the ground she complained of being hurt. She was examined the next day by a physician and numerous bruises were found upon her body and located in such a manner as to be inflicted in the manner which the husband describes. It would be a very violent presumption to hold that these bruises were self-inflicted for the purpose of this suit, or to hold that her exclamation of being hurt was made for the same purpose. The law as announced, in the case of Adam vs. Railroad, decided at this term, is applicable to this, and it will be unnecessary to again go over the same ground.

We have some difficulty in fixing the amount of damage inflicted upon plaintiff's wife. The evidence as to the results of the injury is unsatisfactory to us. We are unable to say whether the disease with

which defendant is suffering is in consequence of this injury. We can go no further than to say that she was bruised and undoubtedly temporarily suffered.

The amount of damages allowed by the jury is excessive.

We can scarcely distinguish this case from the case of Odom vs. Railroad, either in the facts or the injury inflicted upon plaintiff's wife.

We will therefore fix the damages at $500.

It is therefore ordered, adjudged and decreed that the judgment appealed from be amended so as to reduce the amount of damages to the sum of five hundred dollars ($500). In other respects it is affirmed; plaintiff to pay costs of appeal.

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No. 356.

THE STATE EX REL. PHANOR BREAZEALE, DISTRICT ATTORNEY, VS. CLIFTON CANNON, SHERIFF.

In a suit under Art. 171 of the Constitution to have a sheriff declared ineligible because he is a defaulter, the quietus of the auditor, although given after his election, the receipts of the parish treasurer and receipts of the auditor, the manner in which the police jury makes its settlement with the tax collectors, the amount pa d the parish treasurer to show that this was only a partial payment, parol and written testimony as to the fact of defalcation are all admissible in evidence.

The suit to remove an ineligible officer for defalcation is conducted under Art. 171, and not Arts. 196, 201.

In a suit of this kind the State does not have to give bond for an appeal.

APPEAL from the Tenth District Court, Parish of Avoyelles. *Coco, J.*

Phanor Breazeale for Plaintiff and Appellant.

Thomas Overton, John C. Wickliffe and *Joffrion & Joffrion* for Defendant and Appellee.

The opinion of the court was delivered by
MCENERY, J.

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No. 374.

MRS. P. P. GEORGE ET AL. VS. J. S. YOUNG, SHERIFF AND TAX COLLECTOR.

The produce taxes authorized by Act 74 of 1892 are local assessments and enfranchised from the limitations of the Constitution.

The legislative judgment embodied in the act creating the "Caddo Levee District," within defined lines, includes the persons and property which are benefited by the improvement proposed.

It should not be reversed by judicial interposition unless error is evident.

The exact proportion of benefits can not be established in levying "local assessments" for public improvement.

The levee tax is due, although the benefit from the line of levees is not immediate and direct.

It is not manifest that the plaintiffs are not benefited and that they can not at any time be brought within the immediate benefits intended in establishing the Caddo Levee District.

APPEAL from the First District Court, Parish of Caddo.
Taylor, J.

Bell & Randolph for Plaintiffs and Appellees:

1. The specific acreage and produce taxes authorized by Act No. 74 of 1892 are not taxes in the strict legal sense, but "local assessments" or "forced contributions," requiring no constitutional warrant, but rest for their validity on an inherent function of government, are enfranchised from the restraints of the Constitution, but are subjected to the limitation of commensurate benefit to the particularized property on which said assessment or contribution is imposed. 43 An. 15 and 837.
2. The *ad valorem* or 10-mill tax provided for in said Act No. 74, while it may be a tax *eo nomine*, imposed by virtue of Art. 214 of the Constitution, is not enfranchised from Constitution's restraints, and *a fortiori*, is not relieved from the primordial restriction, underlying all exactions by virtue of the taxing power "taxation and protection are reciprocal."
3. As a corollary to the foregoing, any district tax, assessment or forced contribution imposed by a board of levee commissioners, for the purpose of building levees to protect the property of said district from overflow, on lands that by the location and construction of the levee are thrown "outside the breastworks," and between the levee and a navigable stream, is illegal and ultra the power of the levee commissioners, for the reason that said lands can not possibly receive any benefit, but positive injury from levee constructed or proposed.
4. When a board of levee commissioners so locate and construct a levee on a navigable stream as to leave lands in front of the levee so constructed and between it and said navigable stream, it excludes said lands from its taxing district, inasmuch as the levees thus established, according to law, become the banks of said navigable stream, and the land thus thrown out becomes a part of said banks, or the bed, of the river, the use of which is in the public, and not intended to be protected from overflow. C. C., Art. 457; Henderson vs. Mayer, 3 La. 657.

Wise & Herndon, Attorneys for the Caddo Levee Board, for Defendant and Appellant.

The opinion of the court was delivered by

BREAUX, J. The plaintiffs and appellees are owners of lands situated within the limits of the "Caddo Levee District;" that district embraces all that portion of the land subject to overflow in the parish of Caddo, within stated boundaries. The provisions of the act creating the district are similar to the other legislative acts creating levee districts for the protection of lands and property from destruction or damage by flood.

Lands and other property in the district are subject to taxation, local assessment and forced contribution, to raise fund for the purpose of the act.

The plaintiffs claim exemption from the levee taxes sought to be collected under the terms of the act, and assign for reason that their lands are left out and are not protected by levees; that they receive no possible benefit, but positive injury, and that any tax, contribution or assessment imposed and levied are illegal and not within the powers of the levee commissioners.

They interpose objection to the assessment imposed under Sec. 6 of the act, and to the special assessment under Sec. 7.

The evidence shows that the levees at this time afford no protection to plaintiff's lands; that they are between the levee and the natural banks of the river; that they derive no benefit from the location and construction of the levees, but on the contrary are damaged; that they are more exposed to overflow than prior to the construction of the levee built by the State, being part of the system of State levees in the parish of Caddo as located by State Engineers.

Adjudications upon the subject of local taxation for local improvement have been frequent.

As early as the case of Yeatman vs. Crandall, 11 An. 220—not the first adjudication upon the subject—it was decided that the Legislature might lawfully erect any portion of the State it saw fit into a district for special local improvement and assess the cost exclusively upon the district.

One of the justices in that case yielded his opinion expressed in several dissents and concurred with the court in holding that the article in question and similar articles under the Constitution pre-

ceding, were not intended to apply to municipal or local taxation for improvements.

In the present decade also a number of adjudications have been made. In the last decided case there was an additional ground which is stated as follows:

"That the particular land of the plaintiff is subject to overflow, and is not protected by the levees built or proposed to be built; that it requires no such protection and can derive no possible benefit or advantage from the levees, and that, therefore, the assessments are a taxing of private property for public purposes without compensation."

Passing upon the question, the court says that it is only where the assessment is manifestly unjust and oppressive that a court would be justified in overruling the legislative judgment.

The Legislature necessarily has a large discretion on this subject.

In carrying out this scheme of leveeing it has defined the limits by following certain lines of lands subject to overflow.

It was not possible in defining these limits to consult personal interests or to except those lands not susceptible of receiving immediate benefit.

These acts creating levee districts embrace entire areas; if exceptions were made it would probably defeat the purpose in adopting the law.

Approximate or even remote equality would be an impossibility.

Certain lands must, in the nature of things, receive much greater benefit than others.

The exemption of certain lands from the operations of the law would defeat the legislative intent.

Judicial interposition becomes delicate and exceedingly difficult.

To interpose, it must be made manifest that the property is permanently and intentionally excluded from all possible benefits.

We quote from Cooley on Constitutional Limitations, p. 509:

"In many other cases, besides, the construction, improvement and repair of streets may, in special taxing districts, be created with a view to local improvements. The cases of drains to relieve swamps, marshes and other lowlands of their stagnant water, and of levees to prevent being overflowed by rivers, will at once suggest themselves. In providing for such cases, however, the Legislature exercises another power besides the power of taxation. On the theory

that the drainage is for the sole purpose of benefiting the lands of individuals, it might be difficult to defend such legislation. But if the stagnant water comes to threaten disease it may be a nuisance, which, under its power of police, the State would have authority to abate."

The lands are included within the limits of the district.

The benefits of the levee system it is not the legislative intent to limit to particular lines.

If the lands adjacent are overflowed and uninhabitable, those of plaintiff's must necessarily be valueless.

These considerations governed heretofore in a well considered case by a full bench.

The organ of the court in the case was the organ of the court in the first case decided under the present Constitution, *i. e.*, ——— vs. Tax Collector, 39 An. 455.

After a number of intervening years the first decision was unanimously affirmed.

In the last, the Minor case (43 An. 337), the question of the extent of the interest was involved.

The doctrines laid down in that case apply to the case at bar.

Public necessity demanded the adoption of a measure as a protection from overflow.

The taxes imposed and collected under the measure adopted are not expended for the good of the few. It contributes to a system in which the whole State is interested.

Without levee districts and levee protection a large area of land would be uninhabitable.

The value of all lands within these districts would amount to little, if anything, whether within the limit of immediate protection or beyond.

In the general system of levees every land owner has an appreciable interest.

Plaintiffs in injunction also urge in their defence against the tax that the Board of Levee Commissioners have located and constructed a levee on a navigable stream (so as to leave lands in front of the levee so constructed and between it and the navigable stream), it excludes these lands from the taxing district; that they become the banks, of which the lands thrown out become a part, the use of which is in the public, and not intended to be protected from overflow.

They refer to Art. 457, C. C.

These lands are subject to a public servitude, which is well defined.

The ownership remains to the owner of the lands, and extends to the borders of the water.

They exercise all the rights of owners over the "littoral" except those specially reserved in public interest.

The use in the public does not change the title, and render them less subject to taxation.

It is therefore ordered, adjudged and decreed that the judgment appealed from be annulled, avoided and reversed.

It is further ordered, adjudged and decreed that plaintiffs' demand be rejected and dismissed; that their writ of injunction be dissolved and annulled; that plaintiffs pay the costs of both courts.

CASES

ARGUED AND DETERMINED IN THE

SUPREME COURT OF LOUISIANA,

AT NEW ORLEANS,

IN

NOVEMBER, 1893.

JUDGES OF THE COURT:

HON. FRANCIS T. NICHOLLS, *Chief Justice.*

HON. LYNN B. WATKINS,
HON. SAMUEL D. McENERY,
HON. JOSEPH A. BREAUX,
*HON. CHARLES PARLANGE,
} *Associate Justices.*

*Appointed on the 4th of October, 1893.

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No. 11,193.

SUCCESSION OF MYRA CLARK GAINES.

1. Neither the domicil nor the residence of Myra Clark Gaines was in Louisiana. In 1885 she was temporarily in the State, but her domicil at that time was in Kings county, in the State of New York.
2. By her death her succession was immediately opened at her domicil, independently of her having property at that time in New York. Whether that succession as to its character was legal or testamentary was a question necessarily to be determined by the Probate Court of the domicil. The unity of the succession was not destroyed by the fact that portions of the property might be located in different jurisdictions in different States, and because, from motives of public policy, or the operation of local laws, property so situated might be partially or entirely withdrawn from the control of the laws of the State of the domicil or subjected for the same reasons to special restrictions.

3. The Probate Court of Kings county, New York, was unquestionably authorized to have presented to it an instrument purporting to be the last will and testament of the deceased, and, after due proceedings and inquiry had, to determine whether it was such last will and testament under the laws of the place of the domicil.

Upon presentation to the Civil District Court of a duly authenticated record of the Probate Court of the domicil of a deceased person probating a certain instrument as the last will and testament of that person, and ordering its execution, it was the duty of that court also to recognize the instrument as such last will, notwithstanding the fact that the instrument had been once offered in the Civil District Court for probate, and as a matter of original probate the probate had been refused on the ground that it did not, as to form, comply with the laws of Louisiana. When the instrument was presented the second time the Civil District Court was not called on to deal directly with and on the instrument as a matter still in *pais* for the purpose of determining whether it was the last will and testament of the deceased; that question had passed on to and been determined by the court competent and authorized to do so, and it was merged in the judgment of that court. A recognition of the will as such when presented under such circumstances was perfectly consistent with the correctness of the original decree of the Civil District Court refusing to probate it as an original question. A recognition of the instrument as the last will of the deceased will not necessarily carry with it an execution in Louisiana of all the provisions of the will. If there be any parties in this State creditors, or others who have legal right to contest its provisions, those rights will remain unaffected by the simple recognition as a fact that the instrument is the last will of the deceased. An ancillary succession having been opened in this State, before property can be withdrawn from the hands of the administrator, proceedings contradictorily with him will have to be taken which will furnish ample opportunity to all parties legally interested to protect their rights.

The fact that the decree of the Probate Court of Kings county, New York, has been appealed from devolutively does not present any legal reason for not recognizing presently in Louisiana the decree.

APPEAL from the Civil District Court for the Parish of Orleans.
King, J.

Richard DeGray and *Browne & Choate* for the Appellants:

1. Personal property has no situs but that of the owner, and its transmission by contract, inheritance or will is controlled by the law of the domicil of said owner. Succession of Alice Packwood, 9 Ro. 443; Succession of McCandless, 3 An. 581; Peale vs. White, 7 An. 449; Atkinson vs. Rogers, 14 An. 633; Perin vs. McMicken, 15 An. 155; Thomas vs. Morrisat, 76 Ga. 384; 2 Kent Com. 429; 4 Kent Com. 513; Wilkin vs. Ellett, 9 Wall. 740. And there is nothing in the statutes or jurisprudence of Louisiana to the contrary. Article 491 of the Civil Code has no reference to the disposition of personal property situated in Louisiana and owned by parties domiciled in other States or foreign countries. Perin vs. McMicken, 15 An., p. 155; Succession of McCandless, 3 An. 581; Succession of Franklin, 7 An. 395.

2. The proceedings of the probate of a will in any State is a judicial proceeding under Art. 4, Sec. 1, of the Constitution of the United States, and when duly authenticated under act of Congress of the 26th May, 1790—now Sec 905, U. S. Rev. Stat.—is entitled to full faith and credit in every other State to which it may be brought. Succession of Thomas E. Bowles, 3 Rob. 34; Johnson vs. Runnels, 6 Mart. N. S., p. 622; Balfour vs. Chew, 5 Mart. N. S., p. 519; Bright vs. White, 8 Missouri, 426; Robertson vs. Barton, 6 Monroe's Ky. Reports; Haile vs. Hill, 13 Missouri, 618; Thomas vs. Morrisat, 76 Ga. 384; Dalrymple vs. Gamble, 68 Md. 523; Green vs. Sarmiento, 3 Wash. C. C. 21; and is to have the same force and effect in the State to which it may be brought, even though such judgment could not be there rendered, as it has in the State whence it is taken. Hampton vs. McConnell, 3 Wheaton, 234; Renaud vs. Abbott, 116 U. S. 277; Carpenter vs. Strange, 141 U. S. 87; and the refusal to give said judicial proceedings such precise force and effect is a denial of a right secured under the Constitution and laws of the United States. Christmas vs. Russell, 5 Wall. 290; Green vs. VanBuskirk, 5 Wall. 307, and 7 Wall. 139; Insurance Co. vs. Harris, 97 U. S. 331, 336; Crescent City Co. vs. Butchers' Union, 120 U. S. 141, 146, 147; Carpenter vs. Strange, 141 U. S 87; Huntington vs. Attrill, 146 U. S. 657.
3. Any statute or law or decision denying this effect is unconstitutional and void. Christmas vs. Russell, 5 Wall. 290.
4. And when a will has been duly proved before a competent judge of the place where it was received, the order of execution in Louisiana should be granted without any other form. Civil Code, Art. 1689; Succession of Bowles, 3 Rob. 34.
5. The succession at the place of domicil of the deceased is the home or primary succession, and that at the place where property may be situated outside of the State of the home or primary succession is the ancillary succession. Story's Conflict of Laws, Sec. 513; Stevens vs. Gaylord, 11 Mass. 262, 263; Succession of Milton Taylor, 28 An. 367, 372; Borer vs. Chapman, 119 U. S. 599.
6. And it makes no difference which succession is opened first. Stevens vs. Gaylord, 11 Mass. 262, 263.
7. After the payment of cred tors, costs and charges, at the place of the ancillary succession, the residuum of the estate should be sent to the place of the primary or home succession for the payment of costs and charges there incurred, debts there due, and for distribution of the balance in accordance with the directions of the will or according to law. Story's Conflict of Laws, Sec. 513; Gravelon vs. Richards, 13 La. 298, 299; Mourain vs. Poydras, 6 An. 152; Wilkins vs. Ellett, 9 Wall. 741; Freeman on Judgments, Sec. 605a.

Farrar, Jonas & Kruttschnitt on the same side.

Thomas J. Semmes and *Rouse & Grant* for the Appellees:

1. Only wills made in other States can be registered and executed here on the faith of a foreign probate—a will made in Louisiana must be probated here. C. C. 1688, 1689; 8 N. S. 585; 13 La. 221; 17 La 486; 18 La 570; 2 R. 443; 6 R. 236; 3 An. 579; 12 An. 399; 24 An. 386; 28 An. 57; 39 An 887; 32 An. 385.
   But a will made abroad need not be probated in the place where made. State ex rel. vs. Judge of Iberville, 8 N. S. 586.
3. The common law rule that a will of personal property valid at the domicil of the testator is valid everywhere does not prevail in Louisiana. We have substituted in its place the *lex regis actum*. C. C. 10, 1596; 2 R. 258; Suc. of Senac.

3. A will made in Louisiana has no effect here until probated in our courts. Aubert vs. Aubert, 6 An. 104; C. C. 1644; 5 An. 265,613; 10 La. 533.
4. The Code of 1808 did not admit the registry and execution of a foreign will on the faith of a foreign probate; Articles 1688 and 1689 were introduced by the compilers of the Code of 1825.
5. The probate of a will is in the nature of a proceeding *in rem*.
6. The probate decree in New York being a decree *in rem* merely affects property within the State of New York and can not affect property, real or personal, situated elsewhere. And full faith is given to it when it is treated as a valid decree on property of the deceased administered in New York. 10 Grattan, 368; 138 Mass. 121; 83 Grattan. 229; 82 Grattan, 666; 1 Pick. 535; 81 Ala. 425; 5 Rhode Island, 119 and 204; 127 U. S. 291; 7 Heiskell, 88.
7. The State may prescribe the conditions on which property, real or personal, within its limits, shall pass to successors, and therefore to prescribe the probate and registry and execution of a foreign will as a condition upon which it is to take effect, and until the condition is complied with such will has no legal effect. 12 Wheat. 175; 9 Wheat. 570; 18 Pick. 8; 10 Gray, 163; 6 An. 637; 30 An. 887; 7 Heiskell, 88.
8. An entire succession is an immovable, and such is the character of this action by the New York administrator against the heirs at law. C. C. 471; 11 An. 196; 10 An. 772; 14 An. 537.
9. Personal property for purposes of administration has a situs, and especially a judgment, and particularly so far as testate successions in Louisiana are concerned, the fiction *mobilia personam sequuntur* is not recognized because the law of domicil as to wills does not exist here. 5 Pet. 522; 109 U. S. 656; 133 U. S. 128; 141 U. S. 27; 5 Wallace, 312; 2 M. N. S., Olivier vs. Townes.
10. The jurisdiction of the surrogate court may be inquired into, and if the facts on which it founded its jurisdiction do not really exist the decree is a nullity. Whitman vs. Thompson, 18 Wall. 457.
11. Domicil is not established by a mere claim of residence in a certain place; the fact of residence must be combined with intention to make the place a permanent home. Suc. of Franklin, 7 An. 408-9; 16 La. 596; 10 An. 268.

The opinion of the court was delivered by

NICHOLLS, C. J. Mrs. Myra Clark Gaines died in the city of New Orleans on the 9th of January, 1885.

On the 12th of January of the same year Mrs. Marie P. Evans presented for probate to the Civil District Court for the parish of Orleans what purported to be an olographic will of the deceased, dated New Orleans, January 8, 1885.

On the same day, what also purported to be a will of the deceased in the nuncupative form, under private signature, dated New Orleans, January 5, 1885, was presented for probate to the same court by W. H. Wilder and J. Y. Christmas, who were therein named as executors. They resisted the probate of the will of January 8, on the ground that it was a forgery.

The probate of the will of January 5 was resisted by Mrs. Evans, on the ground that it had been superseded by a will subsequent in date and was defective in form.

These issues were presented and tried, resulting in a judgment, rendered February 21, 1885, which decreed that the instrument purporting to be an olographic will of Mrs. Gaines, dated January 8, 1885, was fraudulent and forged, and not entitled to probate, and that the nuncupative will of January 5, 1885, was defective in form, and therefore not entitled to probate, reserving however the right of the executors to propound the same for probate at Washington, D. C., the domicil of the deceased.

On an appeal to this court, taken by Mrs. Evans, from that part of the judgment which declared the alleged will of January 8 to be a forgery, the judgment of the District Court was affirmed.

No appeal was taken from the judgment refusing to probate the will of January 5, 1885.

The judgment having become final, the District Court appointed Mrs. Mattie L. Whitney tutrix of her minor children, who were grandchildren of the deceased, and appointed James Y. Christmas tutor of his minor children, they being grandchildren of Mrs. Gaines, and they in their said capacities administered the succession in Louisiana.

Subsequently James Y. Christmas died, and after a contest upon the administratorship the court appointed William Wallace Whitney, who had became of age, administrator of the succession in this State.

Subsequently to the refusal of the District Court to probate, as has been stated, the nuncupative will of January 5, it was taken to the Surrogate's Court for the county of Kings, in the city of Brooklyn, State of New York, and there offered for probate by W. H. Wilder, the surviving executor named in the will.

The probate was there opposed by Mrs. Marie P. Evans, who set up the forged will of January 8, 1885. This latter instrument was again rejected, and the nuncupative will of January 5, 1885, was by a judgment rendered June 29, 1891, decreed to have been properly executed, conformably to the statutes of New York, to be genuine and valid, and to be the last will and testament of Myra Clark Gaines.

It was further decreed that at the time of the execution of said instrument Mrs. Gaines was in all respects competent to make the same, and was not under any restraint or undue influence.

The judgment further declared that *William W. Whitney*, Myra C. Whitney, Zulime Whitney, William W. Christmas, Rhoda B. Kennedy, James M. Christmas, all heirs and next of kin of Mrs. Gaines, had been made parties to and had made appearance in the proceeding—the minor, Zulime Whitney, appearing through her special guardian, William H. Ford.

An appeal, devolutive in character, and which is still pending in New York, was taken from this judgment by William W. Christmas and Rhoda B. Kennedy.

On the 4th August, 1892, the surrogate, declaring that a delay had been necessarily produced in granting letters testamentary or letters of administration on the estate of Mrs. Gaines, and that at the time of her death she was a resident of the county of Kings, by reason whereof the ordering and granting administration of all and singular the personal property, goods, chattels and credits whereof she died possessed appertained to his court, appointed William B. Davenport, public administrator in Kings county, temporary administrator of all the said personal property, goods, chattels and credits.

On the 11th December, 1892, William B. Davenport, as public administrator in Kings county, Brooklyn, New York, and temporary administrator of the personal property, goods, chattels and credits of Mrs. Myra Clark Gaines, filed a petition in the District Court for the parish of Orleans, to which he annexed a certified copy of the proceedings had before the surrogate in the matter of the probate of the will of Mrs. Gaines, and in which petition he alleged his appointment as above stated, and annexing copies of his letters of appointment he averred that, under the laws of New York, his powers under said appointment were the same as that of executor with seizin under the laws of Louisiana. He further alleged that Mrs. Gaines was at the time of her death and had for many years prior thereto been domiciled in said Kings county.

He prayed that the certified copy of the will be registered and ordered to be executed by the court.

Opposition to this demand was filed by Hattie L. Whitney, William W. Whitney, Zulime Whitney (now wife of ——— Somers), William W. Christmas, James M. Christmas and Rhoda B. Kennedy, wife of Charles A. Kennedy (the said opponents declaring themselves to be the sole heirs at law of Mrs. Gaines), and William W. Whitney, declaring himself to be and as appearing as administrator of the suc-

cession of Mrs. Gaines, now under administration in the Civil District Court.

The grounds of this opposition were—

" 1. Because William H. Wilder had on the 12th of January, 1885, propounded said alleged will to the Civil District Court for the parish of Orleans, and prayed that the same be probated, and after due proceedings had and evidence adduced in support thereof, it was finally ordered, adjudged and decreed that said alleged will was not a valid will, and to it probate was refused, and it was further adjudged and decreed that said Myra Clark Gaines was at the time of the execution of said alleged will domiciled in the District of Columbia, and the right of proponent to apply to the proper court in said district for the probate of said will was reserved, all of which will more fully appear by the proceedings and judgment therein rendered the 27th day of February, 1885, and which judgment has not been appealed from, annulled or vacated, and remains in full force and effect.

" 2. Because said Myra Clark Gaines did not die in the State of New York, was not domiciled therein, nor was a resident thereof at the time of her death, and had no property in said State, and said Surrogate's Court of Kings county in said State was without jurisdiction to admit said alleged will to probate.

" 3. Because the records of the proceedings in said Surrogate's Court, upon the petition of said Wilder for the probate of said will, show that the decree admitting said will to probate has been appealed from, which appeal is still pending, and said decree is not a final one, which authorizes this court to order the registry and execution of said will.

" 4. Because a will made in Louisiana and rejected by its courts can have no effect in Louisiana, although it may be admitted to probate elsewhere."

After the opposition had been filed Edmund P. Gaines, of New York, Myra Clark Gaines Mazerat, John W. Harmon, of Mississippi, and George W. Benson, of Georgia, all legatees under the will sought to be probated, intervened in the proceedings, praying that the balance of the funds in the hands of William Wallace Whitney, administrator, after the payment of the debts, judgments, legal charges, and such claims as are now in process of adjustment in the courts sitting in Louisiana, be ordered paid over to William B.

Davenport, temporary administrator of the estate of Myra Clark Gaines, in Kings county, New York.

The district judge on trial of the opposition sustained the same and refused the application of William B. Davenport, the temporary administrator, and rejected the will.

William B. Davenport has appealed, as have the intervenors, from the judgment.

The District Court considered that the will of Myra Clark Gaines dated January 5, 1885, having been made in Louisiana is governed by the laws of Louisiana, and, having been already decreed invalid by that court because not made in the form prescribed by that law, it could not be taken to New York, the last domicil of the testator, probated there, and, having been received and made valid in New York by the laws of New York, brought back here for recognition and execution by it on property situated in this State and in possession of an officer of that court.

The district judge, in his opinion, says: "The will was probated in New York because the city of Brooklyn, in the county of Kings, State of New York, was considered the last domicil of the deceased. It is proved in this case to be so by her own judicial admissions made in the courts of this State and in the Federal courts years prior and a few months before her death, and since her death conceded to be her domicil by her heirs and those administering her succession.

"The reservation in the judgment to propound the will at Washington, D. C., the domicil of the deceased, is mere *obiter dictum*, as the place of the domicil was not at issue in that proceeding. It is simply a reservation to propound the will for probate at the last domicil of the deceased, wheresoever that might be."

He further says:

"This court has already determined that the will was not made in the form prescribed by our laws, and therefore under Art. 1595 was null and void. The fact that the deceased resided out of this State did not empower her to dispose of her property in this State in a manner different from that prescribed by the laws of this State. Art. 491 of the Civil Code declares that persons who reside out of the State can not dispose of the property they possess here in a manner different from that prescribed by its laws."

"It is immaterial whether Myra Clark Gaines' domicil was here or in New York. Her will is governed by the laws of Louisiana, the

law of the place where it was made, not by the law of the domicil. It having been made in Louisiana no other law can be resorted to for the purpose of determining its validity as to form or effect so far as its operation on property in this State is concerned."

"The domicil of a testator as to the form and effect of a will is ignored by our law. It is the place where it is made and the property disposed of where situated that is recognized. * * * The decree of the Surrogate's Court of Kings county, New York, merely declares that the will is a valid will in New York. It does not decree that it is valid everywhere. It is valid there, and whether admitted to probate here or not the action of this court can not alter its effect upon property there."

In discussing the legal propositions submitted to us in this case, we hold as established beyond question as a fact, that at the time of the making of the will of January 5, 1885, and at the time of her death, Mrs. Myra Clark Gaines' domicil was in the city of Brooklyn, New York State, and that she was only temporarily in New Orleans at that time.

The first ground of opposition submitted by the appellees was, as we have seen, that the District Court for the parish of Orleans had, on the 27th February, 1885, on the application of W. H. Wilder and James Y. Christmas to probate the will of the 5th of January, in which they were named executors, refused to do so and reserved their right to propound the same for probate at the city of Washington as the place of her domicil, and that this decree never having been appealed from, annulled or vacated, remained still in full force and effect.

The record does not show whether this particular contention, which is substantially a plea of *res judicata*, was interposed or not as an objection in the Surrogate's Court. Whether it was so interposed or whether made for the first time in the last proceedings in Louisiana, it was in neither event well taken. The only question before the Civil District Court in 1885 was whether that court should, as a matter of *original probate*, probate the will, and that question was determined adversely to the probate solely because it did not conform as to form with the requirements of the laws of this State. Neither the correctness nor the force and effect of that judgment on the issue as so presented are contested nor will that judgment be affected by a decree rendered in the present proceeding. It can stand per-

fectly consistently with the granting of the application we are now considering.

As regards the domicil of the testator that question was not an issue in the former proceeding, and the mention of her domicil (made in that portion of the decree reserving the executor the right to propound the will for probate elsewhere) as being in the city of Washington was uncalled for, bound no one, and was entirely surplusage.

The *second* objection was to the probate of the will by the surrogate on the ground of a want of jurisdiction in the Surrogate Court. This want of jurisdiction, which seems to have been once urged and then formally withdrawn in that court, is based upon the claim that Mrs. Gaines did not die in the State of New York, was not domiciled nor a resident thereof at the time of her death, and had no property in that State. We concur in opinion with the surrogate and the district judge that Mrs. Gaines' domicil was in Kings county, New York, at the time of her death.

Her succession was instantly opened by the fact of her death at the place of her domicil. That result was totally independent of her having property at that time in the county of Kings, or in the State of New York. Whether when she died her succession was, as to its character, a legal or a testamentary one, was a question necessarily to be determined at the place of legal opening. When the succession opened it opened as a single and entire succession. The unity of the succession was not destroyed by the fact that portions of the property might be located in different jurisdictions and in different States, and because from motives of public policy or the operation of local laws the property so situated might be withdrawn partially or entirely from the control of the laws of the State of the domicil, or subjected for the same reasons to special restrictions.

The language of this court in Burbank vs. Payne & Harrison, 17 An. 15. that when a person dies leaving property in two or more countries his property in each State is considered as a separate succession for the purpose of administration, the payment of debts and the decision of the claims of parties asserting title thereto was never intended to convey the idea that the fictitious being or entity known as the "succession" was, from a legal standpoint, other than single and indivisible. The court was dealing, not with the succession itself, but with the effect of the laws of

Louisiana upon property of that succession which chanced to be within the limits of this State.

The domicil of the deceased person being the place of the opening of the home or mother succession—the succession proper—the court of that domicil is unquestionably authorized to have presented to it an instrument purporting to be the last will and testament of the deceased, and after due proceeding and inquiry had, to determine whether it be such last will under the laws of the place of the domicil. In the matter before us the surrogate, in a proceeding to which the surviving executor and the legal heirs and next of kin of Mrs. Gaines were parties, had propounded before his court for probate the will of the 5th January, 1885, and, after hearing, pronounced it the last will and testament of Mrs. Gaines, probated it and ordered its execution. He did so in the clear exercise of his jurisdiction.

If a decree in Louisiana, could under any circumstances, have controlled the surrogate in his action, the particular decree relied on certainly did not do so, for it recognizes the right (if any such recognition were necessary) to a future probate at the testator's domicil, and did not attempt to close the door to subsequent action elsewhere. It expressly reserved that right.

The third objection was that the probate decree in New York could not be legally registered and acted upon here, for the reason that it was not a final decree, an appeal having been taken from the same. The appeal taken was not suspensive, and the evidence establishes that the effect of the decree as such was not interfered with by the appeal.

The fourth ground of opposition assigned, and which was sustained by the District Court, was "that a will made in Louisiana and rejected by its courts could have no effect in Louisiana, although it may be admitted to probate elsewhere."

In maintaining this ground of opposition, refusing the application and rejecting the will, we are of the opinion the judge erred.

His error was occasioned by taking into consideration for the purpose of reaching his conclusions, some subjects which were outside of and foreign to the restricted issue submitted to him.

The question before him was not whether the instrument purporting to be Mrs. Gaines' will should be probated here as a matter of original probate. That had been once attempted in his court and failed, the court however properly recognizing the right of the

parties in interest to propound it later for probate at the domicil. The parties in interest acted upon that suggestion. When the case went a second time before the lower court, matters had advanced very greatly beyond the point where the first judgment left them. When brought a second time before the Civil District Court, the case was presented under entirely different conditions from those which had existed before, the object of the demand being also essentially different. In the case at bar the court was not called on to deal directly with and on the instrument as a matter still in *pais* for the purpose of determining whether it was really the last will and testament of the deceased. That question had passed on to and been determined by a court competent and authorized to do so, and it was merged in the judgment of that court.

What the court was asked to do was to recognize and give effect to the judgment itself, and as resulting from that judgment to recognize and give effect to the adjudication made on it that a particular instrument, identified with and by the judgment, was really the last will and testament of Mrs. Gaines, made and executed according to the laws of the State in which she had her domicil at the time of its making and the time of her death.

What the application had in view was, not to obtain a decree giving effect to the various provisions of the will, and passing upon and fixing the rights of parties *under the will*, but a decree which would recognize the instrument to be Mrs. Gaines' will and give effect to it to the extent necessary to make it the basis of claims predicated upon it as such.

We are of the opinion that the court erred in giving to the application an intended scope greater than this, and in deciding at this stage of the proceeding, the will and its provisions to be inoperative in this State.

That issue did not legitimately arise on the application before us and should be left at large for the future. If there be any parties in this State, creditors or others, who have the legal right to contest the provisions of the will, those rights would have remained unaffected by simply recognizing as a fact what is unquestionably the fact, that the instrument in question was the will of the deceased. Whether it will be operative or not in Louisiana is a different matter.

An ancillary administration of the succession of Mrs. Gaines has been opened in this State and an administrator has been appointed.

Before property in his hands can be taken from him, proceedings contradictorily with him will have to be taken. That proceeding will furnish ample opportunities to all parties who may have interests injuriously and illegally affected by the will to protect them.

It by no means follows that because the instrument in question discloses uncontrovertibly the last wishes and desires of the deceased, and because we so recognize, that therefore those wishes and desires are to prevail if they come in conflict with the will of the people of this State as evidenced by statutes and decrees of the courts, but the existence of such illegal provisions must be shown in proper proceedings contradictorily with proper parties. The rights of persons claiming under the will can not be summarily disposed of by rejecting the present application. We are of the opinion that when the surrogate of Kings county rendered a decree in proceedings contradictorily taken between W. H. Wilder, as executor of the will, and the legal heirs and next of kin of Mrs. Gaines, holding that the instrument dated January 5, 1885, and purporting to be the last will and testament, was truly and legally such, that particular fact must be taken in this State as fixed by the judgment and given effect to in Louisiana as established.

This result of the judgment is not affected by the fact that the application in this case was made by the temporary administrator instead of the executor. The temporary administrator is legally acting in lieu of the executor.

The intervention of E. P. Gaines and others in the proceedings has no influence upon that question.

For the reasons herein assigned it is ordered, adjudged and decreed that the judgment appealed from be and the same is hereby annulled, avoided and reversed, and it is now ordered, adjudged and decreed that the instrument dated New Orleans, January 5, 1885, purporting to be the last will and testament of Myra Clark Gaines, and probated as such by the Surrogate's Court for the county of Kings, in the State of New York, on the 24th day of June, 1891, be and it is hereby recognized as the last will and testament of Myra Clark Gaines. Costs to be paid by appellees.

Mr. Justice Parlange takes no part.

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No. 11,260.

STATE EX REL ASHTON PHELPS AND PAGE M. BAKER VS. JUDGE OF THE CIVIL DISTRICT COURT FOR THE PARISH OF ORLEANS.

1. The Civil District Court for the parish of Orleans is a court of record of original general jurisdiction, and is not an "inferior court," in the technical sense of that term. It has the power and authority to punish for contempt of court, and though the proceedings in cases of constructive, differ from those in cases of actual contempt, the power of that court, under proper proceedings, extends to both.
2. The general rule is that where a publication in a newspaper being read by jurors and attendants on the courts would have a tendency to interfere with the proper and unbiased administration of the laws in pending cases, it may be adjudged a contempt and accordingly punished.
3. Where an article of that character has been published, the resulting liability or responsibility is not limited to a civil action for damages by the individuals who might be injured thereby. Irreparable injury not to be compensated in money would make such a limited remedy totally inadequate to meet the requirements of the situation and would ignore a consideration of the question as affecting public morals and public interests.
4. Where the Civil District Court has pending before it a matter within its jurisdiction and it is charged that a certain publication is of such a character as to render the publication a contempt of court, the article complained of is, on trial of the charge, presented to it as a piece of evidence in support of the charge, in connection with other testimony, and on the evidence, as a whole, the court acts. The subject matter being within the jurisdiction of the court, some publications being liable to be adjudged an abuse of the liberty of the press and some not, and the conclusions to be reached being dependent upon the evidence submitted, the Supreme Court will not go behind those conclusions and inquire into their correctness on that evidence, under writs of prohibition and certiorari.

APPLICATION for *Certiorari* and Prohibition.

Charles F. Buck for the Relators.

Respondent *in propria persona*.

The opinion of the court was delivered by

NICHOLLS, C. J. The petition filed in this case is as follows:

"The petition of the State of Louisiana on the relation of Ashton Phelps and Page M. Baker, respectively president and chief editor of the Times-Democrat Publishing Company, which company is en-

gaged in the business of printing, publishing and circulating a daily newspaper known as the New Orleans *Times-Democrat*, devoted to the dissemination of the current news of the day, respectfully shows: That on 20th March, 1893, in a suit now pending in the Honorable the Civil District Court for the parish of Orleans, Division 'C' thereof, presided over by Hon. F. A. Monroe, Judge, No. 35,549 of the docket of said Civil District Court, they and each of them were served with a paper or proceeding calling upon and ordering them to show cause, on March 21, 1893, at 11 o'clock A. M, why they should not comply with certain requests on them made or be punished for contempt, a copy of which is herein embodied in full in the words following, to-wit:

"STATE OF LOUISIANA.

"Civil District Court for the Parish of Orleans.

"PETER FABACHER
vs.
"BRYANT & MATHERS. } Division 'C.'

"Thomas Egan, Jr., called in Warranty.

"On motion of Lazarus, Moore & Lemle, of counsel for Peter Fabacher, plaintiff herein, of E. W. Huntington and Horace L. Dufour, of counsel for Bryant & Mathers, defendants, and of White, Parlange & Saunders, of counsel for Thomas Egan, called in warwanty—and on giving this court to be informed and to understand that there is now pending before this court in this division a cause as above entitled wherein Peter Fabacher is plaintiff, Bryant & Mathers are defendants, and Thomas Egan is defendant called in warranty of said Bryant & Mathers; that issue was joined in said cause upon the main demand and upon the call in warranty; that after issue so joined said cause was in due course of procedure fixed for trial; that upon the prayer of the plaintiff it was to be tried by jury.

"And on further giving the court to be informed and to understand that said case was regularly called for trial on Thursday, March 16, 1893, and a jury duly empaneled and sworn to try the issues in said case—that the trial of said case was continued until Friday, March 17, and testimony administered for and on behalf of plaintiff in support of his demand, and that there were two witnesses sworn on said trial, to-wit: Peter Fabacher, the plaintiff, and John Mahone, a witness for and on behalf of the plaintiff; that prior to the adjournment on March 17, the jury being allowed their liberty and freedom, they

were instructed by the court to hold no converse with reference to the case or the issues therein, and were especially instructed and directed not to allow any one to discuss the case which they the jury held as jurors under consideration for a verdict.

"And on further giving the court to be informed and to understand that the case was only partially tried, that all the witnesses for the plaintiff had not been heard, that none had been called for the defendants, Bryant & Mathers, and none for Thomas Egan, called in warranty, and that the case was continued for further consideration by the court and the jury until Tuesday March 21, 1893, at 11 o'clock A. M., when the jury were by said court directed to be present in court to hear the further testimony in the case and to pass upon the issues therein.

"And on giving the court to be further informed and to understand that a newspaper known as the *Times-Democrat*, and published by the Times-Democrat Publishing Company, of which Ashton Phelps is president and Page M. Baker is the manager, did on Sunday, March 19, 1893, publish or cause to be published and circulated throughout the city of New Orleans the daily issue of said paper, in which was contained a commentary or criticism upon the case now pending before this court and the jury, and to give their opinion for the public's perusal, of the relative positions of the parties to this controversy, and their comments upon the testimony of the witnesses who had testified in said case, and that the effect of the said publication was to operate to the injury of all the parties to said case, and was a discussion of the case out of the hearing of the court, and had the effect of influencing the judgment of the jurors, who have been sworn to try the issues upon the evidence as adduced in court and upon the law as given to them by the court.

"And on further giving the coart to be informed and to understand that the statements contained in said article are in many respects not true and not justified by any evidence received in the case.

"And on further giving the court to be informed and to understand that if in the said comments upon the case depending before the court and the jury the said newspaper was acting upon its own motion, it was guilty of a breach of the license and privilege of the press; and if acting from other motives they should disclose to the court at whose suggestion or instance the said publication was made in order that justice may be done, and that there should be no mis-

carriage of justice in consequence of said publication; that by their acts and doings in the premises they have been guilty of a flagrant breach of the decorum of this court and are in contempt thereof.

"It is ordered that the Times Publishing Company, through its manager, Page M. Baker, and its president, Ashton Phelps, do show cause on Tuesday, March 21, 1893, at 11 o'clock A. M., in open court, why the said manager and president should not disclose to the court the party at whose instance the said publication was made, and from whom the information was received, and whether the said publication was paid for, and if so, by whom; or in default thereof, why they should not stand committed for contempt of the authority of this court under the statutes and laws of the State of Louisiana in such cases made and provided."

Relators now further aver that in obedience to said order of court they did then and there appear in open court as ordered, and to said proceedings filed the following answers and return, to-wit, (also herein embodied in full):

"STATE OF LOUISIANA.

"Civil District Court for the Parish of Orleans.

"PETER FABACHER. *vs.* BRYANT & MATHERS. } No. 35,549. Division 'C.'

"And now into this honorable court, through the undersigned attorney, come Ashton Phelps, president of the Times-Democrat Publishing Company, and Page M. Baker, chief editor and manager thereof, and for return to the rule herein taken upon them to show cause why they and each of them should not make certain disclosures in reference to the publication of an article in the *Times-Democrat*, and be punished as in contempt therefor, show—

"1. This honorable court is without jurisdiction and power in the premises to inquire into the matters set forth in said rule by this proceeding and in this collateral manner and especially that the facts and allegations in said rule set forth and the suggestions submitted to this court thereon do not import upon their face a charge for contempt of court or present a state of facts on which the power of this court to punish for contempt of its authority or dignity might arise, and any attempt on the part of this honorable court to inflict punishment would involve an unwarranted assumption and usurpa-

tion of judicial power not conferred by the Constitution and laws of this State.

"2. Reserving the foregoing exception to the jurisdiction and power of the court in the premises, these appearers plead and aver that the article referred to made part of this answer as Exhibit 'A' was published in the usual course of the business of printing the daily newspaper known as 'The New Orleans Times-Democrat,' as an item of news and an account of judicial proceedings then and there had in open court, the right to do which is privileged and guaranteed to respondent under express provisions of the Constitution of this State, subject only to liability or responsibility in damages to any and all persons who might suffer pecuniary or other loss in consequence of said or any publication, and the attempt herein to invoke the power of the court to punish for contempt the publishers of said article is in direct violation of the freedom of the press guaranteed by the laws and Constitutions of the State and of the United States, and especially of Art. 4 of the Constitution of the State, which provides that no law shall be passed 'to abridge the freedom of the press.'

"3. That for these reasons this proceeding is absolutely null and void and unconstitutional as beyond the power and jurisdiction of the court in the manner and form and for the purpose attempted and should be dismissed.

"And appearers pray accordingly to be discharged and all proceedings stayed and for general relief."

Relators now further show that notwithstanding said plea of jurisdiction to the court and said special plea that the matter set forth in said rule could not be held to be a contempt of the orders or persons or dignity of the court, and were not punishable as such; that any attempt to hold the publication of said article a contempt of court involved an unwarranted usurpation of power in violation of the laws and Constitution of the State as aforesaid, his Honor F. A. Monroe, presiding over said Division 'C,' Civil District Court, did entertain said proceedings and proceeded to trial thereof, and has rendered judgment thereon, a certified copy of which, marked Exhibit 'B,' is filed as part hereof, decreeing that said publication constitutes a contempt of his court, but holding under advisement what penalty he shall inflict therefor. Relators show for the reasons hereinabove set forth, and in said answer pleaded specially adopted as part of relator's petition, said entire proceeding is null, void and unconstitu-

tional and all further action therein should be stayed, and said judge restrained and prohibited from further proceeding therein, and prohibited from inflicting the threatened penalty. Relators annex and make part of this petition a certified copy of the rule, answer and judgment rendered therein embodied in Exhibit A and filed herewith.

"Relators show that they are without remedy except by means of the writs of certiorari and prohibition in the premises, to be issued by this honorable court in the just and constitutional exercise of its supervisory power over the judges of said Civil District Court.

"Wherefore, the subjoined affidavits considered, relators pray that writs of certiorari and prohibition issue herein, directed to the Hon. F. A. Monroe, judge presiding over Division 'C' of the Civil District Court, parish of Orleans, commanding a record or transcript of all proceedings had, papers filed and action thereon, to be produced in this honorable court, in the matter of the proceedings for contempt, as in the foregoing petition set forth, against relators—that a writ of prohibition issue, and after due proceedings said writ be made peremptory and perpetual, and all proceedings under said rule for contempt had against these relators, as in the petition set forth, be declared absolutely null and void and set aside, and all further proceedings thereunder perpetually stayed and prohibited; and relators pray that pending this proceeding a restraining order issue, staying and prohibiting all further orders and proceedings in the premises until the final determination of the cause."

Accompanying the petition, as was stated therein, were copies of the article published in the *Times-Democrat* which gave rise to the proceedings (Exhibit "A") and of the judge's action taken at the hearing (Exhibit "B"). We insert the latter as part of the petition, but omit the former, as its consideration has become unnecessary under the conclusions reached by this court.

"EXHIBIT B.

"*Civil District Court for the Parish of Orleans.*

"Tuesday, the 21st day of March, 1893. Present, the Hon. Francis A. Monroe, Judge.

"PETER FABACHER
vs.
BRYANT & MATHERS. } No. 35,549.

"In the matter of the rule herein taken upon the Times-Democrat Publishing Company, through its manager, Page M. Baker, and its

president, Ashton Phelps, to show cause why said manager and president should not disclose to the court the party at whose instance a certain article which appeared in said *Times-Democrat* newspaper on Sunday, March 19, 1893, concerning the case in which said rule is taken and which is now on trial before a jury in this court, was published and from whom the information contained in said article was obtained, and whether said article was paid for, and if so by whom, or in default thereof why they, the defendants in rule, should not stand committed for contempt of this court; said defendants having appeared in person and through their counsel, and having made the disclosures asked for in said rule.

"And the court having heard evidence and argument and being satisfied therefrom that said publication was the voluntary act of said Times-Democrat Publishing Company, for which said company and its officers are alone responsible, and the question being then submitted to the court by the counsel for the plaintiff and for the defendants respectively whether said company was guilty of contempt of court in publishing said article, and the court finding the law and the evidence to sustain the affirmative of this proposition and for the reasons orally assigned in open court, it is ordered that the Times-Democrat Publishing Company and Page M. Baker, manager of said company, be adjudged guilty of contempt of the authority of this court in authorizing, publishing and circulating in a newspaper published and circulated within the jurisdiction of this court an article the tendency and effect of which is necessarily to influence and forestall public opinion and the verdict of the jury on the case now being tried.

"And the court reserves its decision as to the penalty to be imposed for said contempt."

Alternative writs having issued as prayed for, the judge of Division "C" filed a return or answer, in which he declared for cause why the writ of prohibition should not issue; "that when the rule for contempt referred to in relators' petition was called for trial the relators as defendants in said rule being personally present announced, either personally or through their counsel, their readiness to go to trial, as respondent supposed, upon the merits, and without objection that was heard by respondent to the form of proceeding; that the return to said rule was made orally, and the written return which now forms part of the record was filed by permission at a later date, and it was only

after said rule had been disposed of, and upon inspecting said written return or a copy thereof, that respondent learned that said defendants objected to the form of the proceeding. Should it be the case that said objection was made at the trial, and upon this point he was entirely willing to abide by the recollection of counsel for relators, then he averred now, as he would have ruled then, that the proceeding by rule was competent and proper, and upon this point he invoked the opinion of the court." Further answering he averred "that the Civil District Court, of which he was the judge, was a court of record and of general jurisdiction, civil and probate; that said court was established by and derived its powers directly from the Constitution of the State, and that it became possessed, at the moment it was called into existence and without express grant, of such powers, with respect to questions of contempt, as might be necessary for the proper and effective exercise of the jurisdiction directly conferred upon it; that the Constitution conferred upon the Legislature by express grant, authority to *limit* the power of the courts to punish for contempt, but did not confer authority upon that branch of the government to divest the courts of such power, or even limit it to the extent of impairing the efficiency of the courts, nor had any such attempt been made. That no complaint was made that it was the intention of respondent to impose any penalty upon relators not authorized by statute, nor had he any intention to do so; that it was not claimed that the Civil District Court was without jurisdiction in the suit of Peter Fabacher vs. Bryant & Mathers for interfering with the trial of which relators had been adjudged guilty of contempt. That it was a civil action for the recovery of a sum of money exceeding $100 between citizens of New Orleans, of which said court was fully seized of jurisdiction *ratione materiæ* and *ratione personæ*, and said suit was in course of trial before a jury in said court; that the finding of said court, as contained in the judgment, sets forth that the defendants in rule were guilty of contempt in authorizing, publishing and circulating in a newspaper published and circulated within the jurisdiction of the court an article the tendency and effect of which was necessarily to influence and forestall public opinion, and the verdict of the jury in the case then being tried, viz.: the case of Fabacher vs. Bryant, and it was submitted on the authority of 35 An. 1194 and 1195, and 40 An. 434, that the Supreme Court should inquire no further. But should the

court decide to pursue the inquiry, as suggested in relator's petition, then it was submitted: (1) That the Civil District Court as a court of record and of general jurisdiction had the inherent power to punish all contempts, and that so far from attempting to limit such power to particular cases the Legislature had distinctly affirmed it with respect to all, and had limited only the penalty to be imposed. Code of Practice, Arts. 130 and 131.

(2) "That a publication in a newspaper, published and circulated within the jurisdiction of the court, calculated to 'prejudice mankind' and to influence the verdict of a jury in a cause pending before such court and jury was a contempt."

Respondent next proceeded in his answer to argue in favor of the correctness of these two propositions.

It will be noticed that whilst relators were called into court to show cause why they should not disclose to the court the party at whose instance was made a certain publication, which had appeared in the *Times-Democrat* newspaper, and from whom the information therein contained was obtained, and whether the said publication was paid for, and if so by whom, or in default thereof to stand committed for contempt of the authority of the court, relators were declared by the court (in what is termed the judgment of the court) guilty of contempt "in authorizing, publishing and circulating in a newspaper published and circulated within the jurisdiction of the court an article the tendency and effect of which was necessarily to influence and forestall public opinion and the verdict of the jury in the case then being tried."

It will be further noticed that the court declares that relators "had appeared in person and through their counsel had made the disclosures called for," the logical result of which compliance on their part should have been their immediate discharge.

Instead of adhering to the issue apparently raised in their exception, that they could not be ruled into court for the purpose of creating and being punished for contempt for an act which they had not yet but which they might possibly *subsequently* commit, in other words contending that the act charged must have preceded and not be one which would follow the issuing of the rule, relators appear to have acquiesced both in the right of the court to require the particular disclosures demanded and in its right to proceed in the manner which it did. Not only this—they have ignored the fact that the

court has pronounced them guilty of contempt for an act separate, distinct and entirely different from that which was made the subject of possible complaint in the rule and they do not claim that on compliance with the requirements of the rule it should have been discharged.

The district judge in his judgment says that on trial of the rule the counsel for the plaintiffs and defendants respectively submitted to the court whether the Times-Democrat Publishing Company was or was not guilty of contempt in publishing the article, and finding that the law and the evidence sustained the affirmative of that proposition he adjudged the Times-Democrat Publishing Company, and Page M. Baker, manager of that company, guilty of contempt of the authority of his court in so doing.

Relators in their brief say "they are the responsible agents for the *Times-Democrat* newspaper, and about to be punished for a contempt for publishing, pending trial, the article annexed to relators' petition, which the respondent judge held to be an act 'interfering with the trial of the cause,' and a publication tending to prejudice mankind in regard to judicial investigations pending before him, and especially as tending to influence the verdict of a jury in a cause pending, and therefore a contempt of court, and punishable as such; that it was not contended or found that the article contained anything that is offensive *per se* or a libel, an insult, or any reflection on the court, its officers, the jury, or any person or instrumentality whatever called into action in the progress of the trial or the impartial administration of justice; that no objection was made or urged to the form of proceedings; that any wording or phraseology in the '*written return*' to 'the rule for contempt' must be and were intended to be construed with reference to the substantial defence of want of jurisdiction and power in the premises to punish as for contempt the act as charged on the face of the papers. It is a plea to the jurisdiction and an exception of no cause of action. It is not intended to raise a question as to the manner in which the defendants were brought into court."

They then proceed to argue what they claim to be the issues before this court, saying that "the first and controlling issue in the case is the immunity claimed under the constitutional guarantee of the 'freedom of the press,' and that the next suggests the inquiry of the limit of exclusive power of the trial court, or, in other words,

what issues of law or fact will this court review or control under the supervisory power which it exercises by virtue of Article 90 of the Constitution in a contestation of this kind."

It would appear that all parties in the lower court consented to look to the recitals which preceded the "ordering" part of the rule and not to the "ordering" part itself as fixing the issues of the case, and that it was tried from that standpoint.

We greatly disapprove of this departure from the actual pleadings in a matter in regard to which we are called upon to exercise our supervisory powers.

The actual contention of the respective parties become uncertain, and such consent proceedings almost always result in a looseness of practice difficult to be dealt with properly.

We understand the relators to have contended in the lower court, as they do here—

1. That under the Constitutional guarantees of the freedom of the press, the publishers of newspapers generally are secured from liability for contempt of court for articles published in them in the usual course of the business of printing the daily newspaper as an item of news giving an account of judicial proceedings had in open court, the right to do so being privileged and secured under express constitutional provisions in this State, subject only to liability or responsibility in damages to any and all persons who might suffer pecuniary or other loss in consequence of any publication.

2. That the Civil District Court, though created by the Constitution, is an "inferior court," and as such has not at common law power to punish for a constructive contempt; that its power is limited to the cases embraced in Articles 130 and 131 of the Code of Practice, the first of which declares that "all judges possess the power necessary for exercise of their respective jurisdictions though the same be not expressly given by law," and the second that "the judges of the Supreme, District, and Parish Courts have the power to punish all contempts of their authority by fine not exceeding fifty dollars and imprisonment for a period not exceeding ten days for each offence of that kind," and that the power there conferred is limited to do that which is "necessary" for the exercise of the court's jurisdiction.

3. That if a newspaper be liable for contempt for a publication, the matter published must be so direct in its intent and effect as to come within the class of contempts consisting of disobedience to or interference with orders or otherwise directly obstructing the court in the exercise of its functions; that if the publication embodies general comment only, without manifest intent to hinder or interfere, and especially without intent to interfere, with the trial in a particular manner, it does not constitute a contempt even at common law, and if it might be so held, it is in this State and country invested with immunity by constitutional provisions in regard to the freedom of the press; that the particular article in question was not of such a character as has just been described as furnishing a ground for and was not a contempt.

4. That the article in question not being of such a character, the District Court was without power or authority to declare or deal with it as such, and under our supervisory powers we are authorized through writs of prohibition and *certiorari* to review and undo the action of the lower court in that respect as an absolute nullity.

We shall deal with the propositions submitted a little out of their order, taking the second one first, as it strikes at the power and authority and jurisdiction of the lower court.

The Civil District Court is a court of record of original general jurisdiction, and if a direct legislative grant from the Legislature were necessary in this State to confer upon it such powers as have been usually held to be inherent in all such courts it will be found in Art. 130 of the Code of Practice. That article pointedly recognizes and declares the existence in courts of all the powers necessary for the exercise of their respective jurisdictions, inherently and independently of express law, and by necessary implication it gives legislative sanction to the exercise of such powers, and the particular power of the District Courts to punish for contempt was (as if to place that matter beyond the possibility of dispute) specially mentioned in Art. 131. That article is general in its terms save as to the punishment to be inflicted, and is no limitation upon the article which precedes it except in that respect. Art. 130 recognizes the existence of *all* the powers necessary to the jurisdiction without attempting to define what such powers are or should be. The word "jurisdiction" in the article is used in a broad not a restricted sense, and means everything necessary for the maintenance of rightful power and authority.

The statutes of the State are enacted not simply for the defining of rights and obligations, but for their protection and enforcement, and the very object of the organization of courts is through their instrumentality to make certain that justice should be administered by due process of law without denial or unnecessary delay, and with strict impartiality. The purpose of their creation would be crippled and defeated if they were to be unable of themselves, in cases pending within their jurisdiction, to guard the pure and unbiased administration of justice. It is no less the duty of the courts to see that the law be faithfully applied in cases before them than it is the duty of the executive to see that the laws should be generally executed. Brown in his work on Jurisdiction (Sec. 115a) says that "the power to punish for contempts is inherent in all courts, that its existence is essential to the preservation of order in judicial proceedings." If this inherent power exists for the preservation of mere order, for how much greater reason should it exist to protect the fountains of justice from being poisoned and the courts themselves from being brought into contempt and disrepute.

The Supreme Court of Mississippi remarks on the power to fine and imprison for contempt that "from the earliest history of jurisprudence it has been regarded as a necesssary incident and attribute of a court, without which it could no more exist than without a judge. It is a power inherent in all courts of record and coexisting with them by the wise provisions of the common law. A court without the power effectually to protect itself against the assaults of the lawless, or to enforce its orders, judgments or decrees, would be a disgrace to the legislation and a stigma upon the age which invented it. In this country all courts derive their authority from the people and hold it in trust for their security and benefit." Wells on Jurisdiction, page 179; Watson vs. Williams, 36 Miss. 341.

In the correctness of these views we fully concur.

We are of the opinion that the Civil District Court a court of record having original general jurisdiction, is not an "inferior court" in the technical sense of that term; that it has the power and authority to punish for contempts of court; that though the proceedings in matters of constructive differ from those of actual contempts, the power of the District Court under proper proceedings extends to both.

The claim of the relators that, under the constitutional guarantees

of the freedom of the press, "publishers of newspapers are secured from liability for punishment as for contempt of court for articles published in the usual course of the business of printing the daily newspaper as an item of news giving an account of judicial proceedings had in open court, the right to do so being privileged and secured under express constitutional provisions in this State, subject only to liability or responsibility in damages to any and all persons who might suffer pecuniary or other loss in consequence of any publication," is not true as a general proposition.

The general rule as stated by Wells (Wells on Jurisdiction, page 191) is that "where a publication being read by jurors and attendants on the courts would have a tendency to interfere with the proper and unbiased administration of the law in pending cases it may be adjudged a contempt, and accordingly punished."

Where an article of that character has been published it is a great mistake to suppose that the resulting liability or responsibility is limited to a civil action for damages by the individuals who might be prejudiced thereby. Irreparable injury not to be compensated by money would make such a limited remedy totally inadequate to meet the requirements of the situation. Such a contention ignores totally the consideration of the question as affecting the public morals and public interests.

Relators, themselves, in their brief, admit the incorrectness of the broad proposition advanced, forthey say: "that a contempt may be committed by publication, notwithstanding the guaranteed 'freedom' of the press is conceded, but there must be somewhere a limit to the power of the courts in that regard, and as the limit must be found by determining the scope and significance of the constitutional provision, it can not be an arbitrary one, resting solely on the discretion of the particular judge in each case. There is a rule of limitation to be deduced; it is the function, the duty, the high privilege of the court of last resort to find and establish it."

This statement is an abandonment of the claim that *all* publications of judicial proceedings in newspapers are *privileged*, viewed from the standpoint of "contempt proceedings," and the substitution in lieu thereof of the contention that SOME publications are so privileged. If SOME be NOT so protected, it necessarily follows that when a particular article is charged as being of the latter kind the court to

which such a question is submitted must examine and determine the character of the publication.

Such an examination would often carry with it the investigation of and application of facts to the particular case, and a denial of the correctness of the conclusions reached in the matter by the judge would not extend to a denial of the *power to determine;* this power would be admitted—*the proper exercise of the power* would be alone at issue.

The third and fourth contentions of the relators may be considered together. They claim that in this particular case the article published in the *Times-Democrat* which gave rise to these proceedings was not such an article as could be made the basis for a contempt of court, and that this being the case this court in the exercise of its supervisory powers can review the judgment of the District Court pronouncing otherwise—that it can and should set aside that judgment as being null and void.

That this court under some circumstances has the authority under its supervisory powers to review and annul under writs of prohibition and *certiorari* the action of a District Court in ordering the imprisonment of the publishers of a newspaper on a charge of contempt of his court is undoubted. The case of the State ex rel. Liversey vs. Judge, 34 An. 741, was of that character, but it was one differing radically from that before us. The question of the freedom and liberty of the press was there presented, but under an entirely different state of facts. The syllabus of the case concisely states the points raised and determined, as follows:

"By our bill of rights the 'press' is free from all censorship of what shall be published and entirely exempt from control *in advance* as to what shall appear in print. Courts in this State are therefore absolutely without authority to control *in advance* or to restrain by injunction the liberty enjoyed by the 'press' to publish even what may be of a libellous nature, the party injured having his remedy *after* the publication.

"The court having no power to grant such an injunction it was an absolute nullity and the condemnation for contempt falls with the injunction the moment such nullity has been pronounced by this court, which has supervision in cases like the one at bar."

The doctrine there stated was unquestionably correct, but the court was very careful to say in the body of its decision, "We are to

construe and give effect to our provision precisely as if it declared, in the language of the Constitution of Minnesota, 'the liberty of the press shall forever remain inviolate and all persons may freely speak, write and publish their sentiments on all subjects, being responsible for the abuse of such right.' "

It was precisely the *abuse* of the right which was charged in the present case against the defendants.

When that charge was made, the article complained of was presented to the court as a *piece of evidence* in the case in connection with testimony adduced, and upon the evidence as a whole the court adjudged relators guilty. As the subject matter before the court was within its jurisdiction, as some publications were liable to be adjudged an abuse of the liberty of the press and some not—as the conclusions to be reached in the case were dependent upon the evidence to be submitted and the case was so decided, this court is not to go behind the judgment and inquire into its correctness on that evidence.

Relators, in their brief, say of their exceptions: "It is a plea to the jurisdiction and an exception of 'no cause' of action."

The jurisdictional point was not well taken, and the ruling upon the exception of "no cause of action" is not reviewable in this proceeding. State ex rel. Reid vs. Fournet, 45 An. State ex rel. Barthet vs. Houston, 40 An. 434. State ex rel. O'Malley vs. Judge, 35 An. 1197. State ex rel. Brown vs. Houston, 35 An. 1194.

For the reasons herein assigned it is hereby ordered, adjudged and decreed that the provisional writs issued herein be set aside and relators' demand and application be rejected and dismissed at their costs.

Mr. Justice Parlange takes no part.

Rehearing refused.

No. 11,104.

ALEXANDER GARNIER VS. EMILE BERNARD, ALIAS DUMONTIER.

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106 217

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108 307

In the absence of satisfactory and clear proof of malice and want of probable cause for the prosecution, no recovery can be had for indemnity—both being the essential ingredients of a malicious prosecution.

Courts of justice will not inflict damages on a party who, in good faith, resorts to the law for the protection of his legal rights rather than have recourse to arms.

Garnier vs. Bernard, alias Dumontier.

APPEAL from the Civil District Court, Parish of Orleans. *Voorhies, J.*

Hy. Chiapella and *Louque & McGloin* for Plaintiff and Appellant:

1. Revised Statutes of 1870, Sec. 818; Blass vs. Gregor & Wilson, 15 An. 421; 9 R. 387, 418; 9 An. 219; 1 Hennen, p. 823, No. 7; 824, No. 20.
2. The use of criminal process to enforce a civil claim is an intolerable abuse, even where the claim exists. But if the claim be unfounded it shows a recklessness of the rights and character of others which amounts to malice. The wanton injury of an individual is in itself a malicious act, and where the criminal proceedings are shown entirely without cause no further malice need be proved. Cannell vs. Michel, 6 An. 577.
3. In an action for damages for malicious prosecution, where the evidence shows that the defendant acted from motives of private interest, and without probable cause to support the prosecution, his action under the advice of counsel will not exempt him from liability. Glascock vs. Bridges, 15 An. 672; Block vs. Meyers & Levy, 33 An. 776.
4. A *nolle prosequi*, entered by the district attorney for the State, is a termination of the original process, sufficient to warrant the bringing of the suit for malicious prosecution. 36 Conn. 56; 47 N. J. L. 413; 45 Ind. 440; 133 Mass. 419.
5. The committal by an examining magistrate is mere *prima facie* evidence of probable cause; it may be rebutted. 29 Gratt (Va.), 192; 75 Cal. 287; 22 W. Va. 234; 60 Tex. 438.
6. Where all the facts are pleaded and proven this court can not be bound by the action of the committing magistrate, but will consider the facts and adjudge for itself.

Legal advice to serve as defence in such a case must be from counsel eminent and learned. 22 Fed. Rep. 227.

It must be made to appear that the facts were all fairly disclosed. 33 An. 778; 57 Iowa, 107.

The advice must not be palpably erroneous, or such as should not mislead a man of honest intentions. 22 Fed. Rep. 228; 37 An. 880.

F. P. Poché and *W. J. Waguespack* for Defendant and Appellee:

1. To recover damages in a suit for malicious prosecution there must be clear proof of malice and want of probable cause on the part of the defendant in instituting the prosecution. 44 An. 194; 10 S. R. 865; 41 An. 301; 41 An. 511; 33 An. 915.
2. Probable cause is such a state of facts or circumstances as would create in the mind of a man of ordinary caution and prudence an honest and reasonable belief in the guilt of the party charged, and however innocent the plaintiff may have been of the crime charged. If the defendant shows that he had reasonable grounds for believing him guilty at the time the affidavit was made, there can be responsibility. 8 An. 12; 10 An. 537; 12 An. 333; 16 An. 3; 18 An. 274; 2 Greenl. Ev., Sec. 454.
3. Advice of counsel sought and followed in good faith is proof of probable cause. 9 R. 421; 8 An. 12; 11 An. 290; 15 An. 422; 8 Otto, 127; 2 Greenl. Sec. 459.

4. The mere commitment of the plaintiff to the Criminal District Court for trial after a preliminary examination by the recorder is conclusive evidence of probable cause, completely exonerating defendant. 15 Mass. 243; 4 Munf. 462; 28 Atlantic R. 833; 29 W. N. C. 521; 46 Kan. 550.

5. Courts can not inflict damages on a party for resorting in good faith to law for the protection of his rights rather than taking the chances of a recourse to arms or tamely abandoning the field to a usurper. 44 An. 194; 10 S. R. 865; 15 La. 278; 12 An. 53; 11 An. 419; 33 An. 915.

The opinion of the court was delivered by

WATKINS, J. This is an action in damages for a malicious prosecution—plaintiff's demand being for $2100, subdivided and apportioned as follows, viz.:

1. One thousand dollars actual damages suffered during the eleven months while the criminal prosecution was pending against him, by reason of mental anxiety and distress, humiliation, annoyance and mortification.

2. One thousand dollars punitory damages for the abuse of legal process without probable cause and with malice, in order to vex, harass and humiliate the plaintiff.

3. One hundred dollars paid and expended by the plaintiff for the defence of the aforesaid criminal proceeding.

The petition contains the essential averment of malice, want of probable cause, and the termination of the prosecution by a *nolle prosequi* duly entered; and the defendant's answer is a general denial, coupled with a specific denial of there having been any element of malice in the aforesaid prosecution, and with the distinct averment that he had probable cause for having sworn out an affidavit against the plaintiff, and in procuring his arrest as he did, and hence plaintiff is not entitled to recover against him.

The case was tried by the judge, who rendered a judgment in favor of the defendant, and the plaintiff has appealed.

The facts necessary to be recited are the following, viz.:

The plaintiff and defendant owned and occupied—the latter through a tenant—adjoining properties situated on St. Bernard avenue, in the city of New Orleans, and in the rear of which a new street, to be styled New Orleans street, was contemplated and had been for many years in contemplation, though not formally opened or regularly established by dedication to public use or otherwise.

The defendant acquired the property he occupied, in 1871, by a

title which made no mention of New Orleans street—the square or block in which same was situated having assigned St. Bernard avenue, Claiborne, Prosper and St. Bernard streets as its boundaries.

In anticipation of the opening of the contemplated street some of the adjacent proprietors built their rear fences in such wise as to leave sufficient space for a street, whilst others—and the defendant among the number—had refrained from doing so.

The plaintiff built in 1880, on his lot, a house having its front on what was contemplated to be New Orleans street, and its rear on St. Bernard avenue—that of defendant having been built with its front on St. Bernard avenue and its rear near the contemplated street, that is to say sixteen (16) feet and eleven (11) inches inside of the rear line of his lot, so as to leave enough space for the contemplated street when it should be opened.

But, in the meanwhile, he built his fence on the side of his lot adjoining the plaintiff, so as to enclose the space comprised within the said sixteen (16) feet, and *five* (5) inches above mentioned, with a view to protect the rear portion of his lot from any appearance of a dedication to public use—leaving open a passage of about five or six feet in width only, so as to permit the passage of pedestrians, but to exclude cattle and vehicles.

Some years later the defendant, having discovered that people were attempting to pass their vehicles through the space he had left open for pedestrians, partly closed the same, leaving only a space of four feet. Thereupon the plaintiff repaired to the premises, and, without any warrant or process of law, demolished that portion of the fence the defendant had recently built. After taking legal advice in the premises the defendant made an affidavit before an officer of the law, charging the plaintiff with having committed a trespass under the provisions of R. S., Sec. 818, and procured his arrest.

Acting under the advice of counsel the defendant rebuilt his fence, and again the plaintiff, notwithstanding his being under bond for his appearance to answer the aforesaid charge, broke down the *entire* fence, old as well as *new*, and within a few minutes after it had been re-established.

Again the defendant sought legal advice, and again made affidavit under said section of the statutes. Subsequently a preliminary examination was held before a recorder of the city, and upon hearing the evidence *pro* and *con* he committed him to the Criminal District

Court. Subsequently the prosecuting attorney filed an information against the plaintiff, but ascertaining same to be defective he entered a *nolle prosequi*, for the purpose of recasting the bill. Thereafter the prosecution was renewed by the filing of another information—hence the plaintiff was twice arraigned. This second information was subsequently *nolle prosequied* likewise, and the plaintiff was not subsequently prosecuted.

Throughout all of these proceedings there is nothing to connect the defendant with them in any way, or at any time subsequent to the trial before the recorder. It does not appear that he in way influenced or procured the discontinuance of same.

On this state of facts we are of opinion that the case was correctly disposed of in the court below; for it is settled beyond any controversy that, in order that the plaintiff may recover damages for a malicious prosecution, he should prove that the defendant's motives were malicious and that the prosecution was instituted without probable cause.

The case of Girot vs. Graham, 41 An. 511, was quite a similar case, though not as strong a one for the plaintiff, same having arisen out of a controversy between the two proprietors of contiguous urban lots in the city of New Orleans on a portion of the dividing line between which no fence had been erected.

After giving the plaintiff notice, the defendant, with the assistance of a surveyor, was proceeding to establish an enclosure on what he had been informed was the dividing line, the plaintiff complaining that it encroached somewhat upon his line. Plaintiff then began to close the space the defendant had left open, but subsequently undertook to have it removed further off, to what he had been advised was the proper boundary. While the plaintiff's force was thus engaged, the defendant appeared, remonstrated against the removal of the fence, and attempted to demolish it by force. Thereupon the defendant caused the plaintiff's arrest and made an affidavit against him, and the plaintiff retaliated by making a counter affidavit, and on the trial both parties were discharged.

On this state of facts the opinion of the court says: "The record fails to show malice and want of probable cause, which are essential ingredients in controversies of this kind, on the part of either party, who, under the circumstances, had authority to believe, in good faith, that he had the right to do what he had done—the

plaintiff to remove the fence, the defendant to protest against the displacement and to invoke the law. It is the malice composed of bad feeling and the knowledge of having no just cause of action which create liability. Kearney vs. Holmes, 6 An. 373.

"Public interest and a proper administration of justice require that actions for a malicious prosecution should not be maintained without *clear* proof of malice and want of probable cause. Maloney vs. Doone, 15 La. 278; McCormick vs. Conway, 12 An. 53."

The essential and distinguishing difference between this case and that of Girot's case is, that Garnier did not seek or obtain legal advice relative to his right to remove the fence of Bernard, but, upon his own motion, demolished same. When the latter caused the former's arrest he was, after due examination, committed, and was subsequently twice regularly indicted.

On the authority of that case, and the opinions that are therein cited, we feel bound to maintain the correctness of the judgment appealed from.

As this court properly observed in an old case: "It would be of the worst example to punish this defendant for resorting to law for the protection of his rights rather than taking the chances of a resort to arms, or tamely abandoning the field to an usurper." Lisk vs. Mathias, 11 An. 419. See also to the same effect, Godfrey vs. Soniat, 33 An. 915; Coleman vs. Insurance Co., 36 An. 92; and Deormond vs. St. Amand, 40 An. 374.

Judgment affirmed.

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121 225

No. 11,269.

ALBERT MALLARD ET AL. VS. WIDOW PIERRE DEJAN.

A sale of minors' property without an order of court, and on the recommendation of a family meeting, is null and void.

The adjudicatee at the sale of minors' property, without an order of court, can not be compelled to accept the same, on the deliberations of a family meeting called to ratify such illegal sale. His assent to the ratification is essential under Article 1794 of the Civil Code.

An order for the sale of minors' property at private sale, under Act 25 of 1878, does not authorize a public sale of said property.

When minors' property has been illegally advertised for sale, no order of court having been granted for its sale, and a family meeting is convened, and they recommend the sale of the property on the terms and conditions as advertised, and the judgment of homologation is rendered only a few hours before the sale, said sale can not be construed into a private sale made under the judgment rendered.

The adjudicatee, not having bargained for the property at private sale, can not be compelled to accept the title to said property, as it is on its face suggestive of future and serious litigation.

APPEAL from the Civil District Court for the Parish of Orleans. *Théard, J.*

Geo. C. Andry and *Chas. F. Claiborne* for Plaintiffs and Appellants:

A private sale within the meaning of Acts 134 of 1869 and 25 of 1878 is one which is not preceded nor governed by the articles of the Civil Code and the formalities in relation to judicial partitions.

The order to sell at private sale is not violated if, by consent of all parties, and in order to obtain the best price possible, the property is advertised for sale and cried at auction and adjudicated for a price and on terms fixed by the family meeting. The advertisement was an act of supererogation beneficial to the minor and of which he can not complain.

The ratification made by the principal of the unauthorized act of one assuming to act in his name is retroactive to the date of the act and is equivalent to an original authorization. 9 L. 51; Story on Agency, Sec. 239, and authorities quoted.

The submission of the issues in a partition suit do not make it a consent judgment nor a nullity, if the judgment was rendered after legal formalities. 38 An. 110, 521.

To sell minor's property at private sale to effect a partition under Act 25 of 1878, it is not necessary that there should be a suit for partition, nor citation to the minor, nor judgment of partition contradictorily pronounced. It suffices if the order of sale is obtained with the assent of the tutor. 42 An. 481, 357.

When there are defects in the title of property sold at private sale, or irregularities in the proceedings leading up to a judicial sale, or encumbrances upon the property at the moment of sale, on account of which the purchaser declines to take the title, he may be forced to comply with the sale to him, if afterward the defects in the title are remedied, the irregularities cured, or the encumbrances removed. 7 An. 477; 36 An. 989; 21 An. 282; 6 R. 266; 7 La. 286; 38 An. 518.

Under the letter and spirit of Art. 1794 (1788) of the Civil Code, all contracts made by minors and other incapacitated persons may be ratified by their tutors or curators either by their own action or with the concurrence of a family meeting and the judge in cases when these are required. Likewise all contracts made by tutors and others in excess of their authority or without the legal formalities may be ratified by the same authority which might have originally sanctioned the act.

The overwhelming weight of authority is in favor of the power of the court and family meeting to do by ratification that which they could do by original act. In fact, such is the textual provision of our Code. C. C. 1794; Bank of Lafayette vs. Delery, 2 An. 648; Vaughan vs. Christine, 3 An. 328; Dunbar vs. Creditors, 2 An. 727; Charpaux vs. Bellocq, 31 An. 164.

Chas. J. Théard for Defendant and Appellee:

Where the adjudication made at public auction was of property in which minors were interested and there was no order of court for such sale, and none of the formalities prescribed by law for the alienation of minors' property by a sale at auction were observed, the adjudication is not legal and is null.

Even if it were true (and in this case it is not true) that such a sale has been made by virtue of a judgment authorizing a private sale, the adjudication would be illegal and null.

A private sale and a sale by auction are not the same thing. Civil Code, Arts. 2601, 2602, 2603, 2604, 2605, 2606, 2607, 2608.

Acts Nos. 134 of 1869 and 25 of 1878 did not abrogate those articles, nor the articles of the Code on the subject of the alienation of minors' property at public auction.

Said acts merely provided an additional and distinct mode of effecting the partition of property in which minors were interested.

The partition may be by private sale, under this special statute, if the parties so desire. But, if they do not want to sell by private sale, they must comply with the formalities prescribed by the general law for auction sales and for the alienation of minors' property.

The theory that Act 25 of 1878, when it speaks of a private sale, may be interpreted to mean a voluntary sale by auction, is not only contrary to the plain and unambiguous letter of said act, but would defeat its object, which is, clearly, to save to the minors the expense of an auction sale.

The proceedings of the parties for a pretended partition by private sale were a mere scheme devised by the majors and the tutor of the minors at the last hour for the purpose of maintaining (if found to be advantageous) an authorized auction sale already advertised. (This is conceded by the parties themselves.) The proceedings were a judicial farce, in which the tutor played the part assigned to him by the majors. They are utterly null.

The sale of minors' property, or of property in which they are interested, must always be made by judicial authority (Code of Practice, Art. 1020). The tutor himself can not order the sale, much less can an agent verbally (!) constituted do so. The court alone, on the advice of a family meeting, has the power to order the sale.

The sale of minors' property derives its force and validity entirely from the law; and where that law is not followed the authority which stands in place of the owners' consent is wanting.

In regard to minors' property any other mode of alienating but that which is directed is prohibited. The law must be exactly pursued, and the order of court strictly observed. Elliott vs. Labarre, 2 La., at page 328; Lemos vs. Garcia, 1 Martin N. S., at pages 388 and 389.

A person who has contracted with an incapacitated person may, on discovering his error, apply to the incapacitated person, or his legal representative, to have the imperfect contract affirmed or annulled.

Where the adjudication of property is null and the purchaser does not apply for a ratification, he can not be compelled to accept a new contract of sale resulting from posterior proceedings, to which he was not a party, to which he gave no assent, and which, on the contrary, were resorted to against his express protest.

It is the assent of a party, or that of the person he contracts with, which gives the contract its binding force. Both parties must be bound, or neither

As the application of the purchaser for a ratification of the sale could not have formed a contract without its acceptance by the family meeting, so the determination of the family meeting can not constitute a contract without the intervention of the purchaser. Civil Code, Art. 1794 (1788); Cavelier vs. Germain, 6 La. 215.

The cases of Dunbar vs. Creditors, 2 An. 727, and Charpaux vs. Gibert, 81 An. 164, cited by counsel for appellants as overruling Cavelier vs. Germain, 6 La. 215, are in perfect accord with that decision

In every other case cited by appellants the complaint was merely of "irregularities" in the proceedings leading up to the sale. But in each case the minors' property had been sold with due authority of law, under a judgment of court duly rendered, and the sale had been duly and *bona fide* made in pursuance of the judgment of court. At such sales the purchaser is protected by the order of court.

There is not a single case in which an unwilling purchaser was ever compelled to accept a ratification of an unauthorized adjudication of minors' property at public auction.

The opinion of the court was delivered by

McENERY, J. Albert Mallard, Prudent Mallard, George Mallard, majors, and the minor children of Maria Mallard, deceased, owned a piece of property corner of Royal and Bienville streets.

Some of the co-proprietors were desirous for a division of the property, which could not be divided in kind.

Without an order of court, based upon the recommendations of a family meeting, the parties, the minors being represented by their tutor, who was their father, agreed to sell said property at auction, and advertised the same for sale, on certain terms and conditions, on the 30th of November, 1892, the sale to take place on the 14th of December, 1892, Spear & Escoffier being the licensed auctioneers to effect the sale of the property.

During the interval between the date of the first advertisement of the property and the day of the sale the parties became aware of the fact that judicial proceedings were necessary in order to divest the interest of the minors. Therefore, on the 7th of December, 1892, the major heirs filed a suit against the minor co-proprietors for a partition of the property and prayed for a judgment of partition by private sale, under Acts No. 134 of 1869 and 25 of 1878. A family meeting was held in pursuance of this judgment, and advised that the property be sold at private sale. Upon the petition of the major heirs and the tutor, who had accepted service of the petition in the suit, the deliberations of the family meeting were homologated a few hours before the sale was made by the auctioneers, on 14th December, at 12 o'clock, as advertised on 30th November, 1892. The property was adjudicated to the defendant, the Widow Pierre Dejan, who bid the price of $17,000, being $2000 in excess of the amount at which it was ordered sold at private sale.

There were two other properties cried the same day in pursuance of the advertisement, and sold under the same circumstances. The adjudicatees have complied with their bid.

Believing the adjudication of the property to her illegal, the defendant addressed to the auctioneer and the parties a communication in which she demanded the return of the amount deposited by her, and declined to accept title.

After the defendant had declined to accept title, the tutor and father of the minor children presented a petition to the Civil District Court of the Parish of Orleans, in which he recited all the facts leading up to the sale and the refusal of defendant to accept title, and averring that in his opinion the sale was advantageous to the minors and that it would be to their interests if the sale was ratified and the adjudicatee made to comply with her bid; he prayed for the convening of a family meeting to ratify said sale and to compel the adjudicatee to comply with her bid. The order for the family meeting was granted, and it was convened in pursuance of the order, and advised that all the said proceedings leading up to the sale, including the same, be affirmed and ratified.

The deliberations of this meeting were homologated. On the 30th December the defendant protested against the proposed ratification of the sale to her and declared she would not acquiesce in or assent to the ratification, and renewed her demand for the return of the deposit made by her.

The defendant in answering denies the validity of the adjudication for several reasons:

I.

"That the judgment rendered by this honorable court, Division 'D,' on 14th December, 1892, in the suit of A. Mallard et al. vs. The Minors Dechamps, No. 37,461 of the docket of this court, did not order or authorize the sale of said property at auction, but on the contrary said judgment and the family meeting held in behalf of said minors Dechamps, and upon whose advice said judgment was rendered, ordered that said property should be sold by private sale.

II.

"That even if it could be pretended that a sale by auction for the purpose of effecting a partition between heirs of age and minors might lawfully be made under a judgment ordering that the property

be sold by private sale, the auction sale herein would be and is an absolute nullity, because said auction sale was not made by virtue of the aforesaid judgment, and because the legal advertisements indespensably required for the sale at auction of minors' property were not published, and in point of fact no advertisement whatsoever took place between the date of said judgment and the date of said auction sale.

III.

"That said auction sale was and is also a nullity, not only as to the minors, but as to the major heirs themselves, because the auctioneer did not receive from the sellers, before the sale, authority to sell at auction, and the terms and conditions of the sale in writing, as required by law.

IV.

"That the proceedings in the aforesaid suit No. 37,461 were consent proceedings carried on by the major heirs and the tutor of the said minors, apparently for the purpose of effecting a partition by private sale, but in reality with not the slightest intention of making a private sale, their sole purpose being to do away with the formalities prescribed by law for the sale of minors' property at auction under an advertisement already made.

V.

"That said pretended partition proceedings are moreover null and void, because there was no citation of the said minors, their tutor having without any authority in law waived the citation, and also because the deliberations of the family meeting in behalf of said minors were not homologated by the judge of the parish in which the said minors reside."

There was judgment for defendant, rejecting plaintiff's demand. They appealed.

The plaintiffs contend in answer to the first objection of defendant that the authority to sell at private sale includes the authority to sell at auction with all its formalities and advantages, provided the price is obtained and the terms followed as fixed by the family meeting, which advised and recommended the sale of the minors' property at private sale.

Before the passage of Act 25 of 1878, it was sacramental that the

provisions of the code in relation to the alienation or mortgage of minors' property should be followed strictly. Articles 339, 340, 341, 342, Civil Code.

In the case of DeLemos vs. Garcia, 1 N. S. 338, the question was raised whether there was a distinction in the sale of minors' property made by executors and that made by tutors. "We have found," said Judge Porter, "in the law a difference in the formalities by which these sales are to be made, but we have found none in the necessity of pursuing those prescribed, and we dare not now introduce for the first time the principle that the sale of immovable property belonging to minors, no matter by whom made, can be legally made unless the law is exactly pursued."

And in the case of Elliott et al. vs. Labarre et al., 2 La. 326, it was held that the sale of minors' property, or that of a succession, where the heirs are absent, must pursue the forms of law directed for its alienation or the sale must be annulled, and this doctrine, based on the provisions of the code, has been held from these early decisions to the latest on the same subject announced by this court. Act 25 of 1878 in no way affects this jurisprudence. The forms of law prescribed are to be followed, whether at public or private sale, to effect a partition. Fix vs. Koepke, 44 An. 747.

Was the minors' property sold in accordance with law, and has the law which directed the sale been complied with?

The property was advertised for sale by agreement among the major heirs and the tutor. There was no order of court based upon the advice and recommendation of a family meeting for its sale. The terms of sale were fixed by this agreement and the sale was made as advertised.

The sale would have been an absolute nullity if consummated as advertised; but during the course of the advertisement an order of court was obtained for the sale of the property at private sale to effect a partition in accordance with Act 25 of 1878. Was this order remedial in its effects, and did it cure the preceding defects? We think not. The advice of the family meeting was for a private sale. The judgment of the court homologating the proceedings ordered the property to be disposed of by private sale. That in this particular case the sale was beneficial to the minors can make no difference in the law applicable to the sale of minors' property. Public policy demands a strict enforcement of the provisions of the code

for the sale of minors' property—that is, that the law under which it is sold be pursued. Civil Code 1841; Succession of Morgan, 12 An. 153; Savage vs. Williams, 15 An. 250; Fix vs. Koepke, 44 An. 747.

Act 25 of 1878 only provides an additional mode for the sale of minors' property which is held in indivision. The record does not show that there was any attempt to sell at private sale. The public sale, already advertised, was used as the means of diposing of the minors' interest. It is true the terms and conditions of the public sale were the same as those fixed by the family meeting.

But still it was a public sale, differing from a private sale, both in the proceedings necessary to provoke it for the sale of minors' property and in the costs attending the respective methods.

A greater price might have been obtained at private sale. In the future the minor might have attacked the sale and alleged that he had been defrauded; that his property was sold at public instead of private sale, at which he would have received a greater price. The history of jurisprudence instructs us that such a proceeding is not only possible but probable, and the defendant in this case was therefore tendered a title suggestive of future litigation.

We have repeatedly held that an unwilling vendee can not be compelled to accept such a title. Succession of Weber, 16 An. 420; James vs. Meyer, 41 An. 1100; Beer vs. Leonard, 40 An. 847.

The advertisement of the sale of the property without a decree to support it was continued until the last day, when it was sold. On this day, a few hours before the sale, the decree was rendered ordering the sale of the property to be made by private sale. The fact that this decree was rendered could not make the public sale, unauthorizedly advertised, a private sale. There is no evidence that any attempt had been made to sell at private sale. The fortunate circumstance that a bidder opportunely appeared and offered more than the appraised value does not negative the fact that more might have been obtained by a thorough canvass for a vendee. It is not improbable that bidders refrained from bidding because of the absence of an order to sell in the first instance. A prudent buyer would look to the source for the sale of the property. This is his protection, and not finding an order he would refrain from bidding. The effect of the advertisement and the absence of the order were to destroy competition.

If the adjudicatee had complied with the bid and her title should

afterward be attacked by the minors, when they attained majority, what would be the defence? If she relied upon the order of court and the law for the sale of minors' property, she would find both wanting.

If upon the judgment ordering the property to be sold at private sale the answer would be "You purchased at public sale."

"It was not offered to you at private sale, and your bid was invited by the advertisement for a public sale."

It is evident that the sale was made in pursuance of the advertisement at public auction, without an order of court, and not in pursuance of the order to sell at private sale.

There was no agreement by defendant to purchase under the order to sell at private sale.

One purchasing at auction sale in pursuance of an advertisement must be viewed as one purchasing at auction sale and not as a vendee in a conventional contract at private sale. Collens vs. Demarest, 45 An. 109.

The plaintiffs contend that the adjudication to the defendant was ratified by the proceedings of the family meeting and the judgment homologating the same. He relies upon Art. 1794, Civil Code, and a number of cases quoted in his brief, which do not support his contention.

We have carfully examined these cases and find that the facts bear no resemblance to these in this case. In them the property of the minors had been sold in pursuance of a decree of court which protected the purchaser. In all of these cases there was authority for the sale, and the informalities complained of were relative in their nature and curable by ratification.

In Bank of Louisiana vs. Delery, 2 An. 648, there were relative nullities which only could be taken advantage of by the minor, and which he ratified on attaining his majority.

Dunbar vs. Creditors, 2 An. 727, the contract had been executed. The father of the minors had surrendered in his insolvency community property, one-half of which belonged to the minors. It was sold by the syndics without an order of court, based on the advice of a family meeting.

The syndic filed a tableau of distribution, which the minors opposed, claiming, with privilege, their portion of the proceeds of the sale of the community property. Their demand was sustained. The

court required the sale of the minors' interest ratified through the intervention of a family meeting before they should receive their portion of the proceeds. This was, in effect, carrying out the letter and spirit of Art. 1794 of the Civil Code, as it was an order in behalf of the party, contracting with a minor, calling for a ratification of the contract by a family meeting and an order of court on their deliberations.

This case, we think, sustains the position of the defendant herein.

Vaughan vs. Christine, 3 An. 328: In this case the intervenor claimed that certain property which had been previously partitioned among the heirs should be restored to the succession of the father. More than five years had elapsed since the majority of intervenor, and the court declared the action barred by prescription.

In Charpaux vs. Bellocq, 31 An. 164, the contract of sale had been executed. In 1860 the property was sold by a surviving widow to the defendant. It was held in common with the minor children, and sold without the intervention of a family meeting.

The defendant sold the property to the plaintiff Charpaux on 14th June, 1866. In this act of sale it was stipulated that the notes given by Charpaux for the price should remain in his hands until the title could be perfected to the property. On the 25th March Charpaux instituted suit to annul the sale. The major heirs ratified the sale, and one of the heirs being a minor a family meeting was called and ratified the sale, which proceedings were duly homologated. The demand of the plaintiff was rejected. This case comes under the Art. 1794 of the code, the title being perfected in the interest of and on behalf of the first vendee, the vendor of plaintiff.

In Chalon vs. Walker, 7 An. 477, the parties were all majors. Two were married women, who in the act of partition were not authorized by their husbands, the answers in the suit for the same, however, alleging they were duly authorized. The property was sold at public sale. No experts had been appointed to determine whether the property could be divided in kind or not.

The court held that these informalities were such that the parties having an interest could alone waive them, and, having offered to do so, they should have time in which to ratify the sale.

In Melancon Heirs vs. Duhamel, 7 La. 286, the contract was executed. The suit was to recover the price of land sold. Duhamel was evicted from a large portion of the land by one Broussard. He

had called his vendor in warranty. Broussard in act of renunciation renounced in favor of Duhamel all the advantages, benefits, etc., he had obtained by the judgment of eviction. The warrantor had fully answered the call by preventing the execution of Broussard judgment, and giving to his vendee absolute protection. Judgment was rendered for the price.

In Grimshaw vs. Hart, 6 Robinson, 265, the suit was for the specific performance of a contract for the sale of land. The defendants refused to comply with the contract, because of mortgages on the property. The mortgage creditors offered to intervene in the act of sale and relinquish their claims. A specific performance was decreed.

In Misner vs. Fulshire, 21 An. 282, the decree for the sale of minors' property was made on the advice of a family meeting. The adjudicatees brought suit to have returned to them the price of the property which they had paid, on the ground that the major heirs had not been made parties in the suit for partition. The major heirs accepted their portion of the price, and the court held by doing so they had waived their right to attack the sale.

In the unreported case of the Succession of James Leichleiter, 36 An. 989, the heirs were of age; some had ratified the sale, others had not. Held that the vendee had the right to retain in his hands the portion of the price going to the heirs who had not ratified the sale.

In the Succession of Byrne, 38 An. 518, the adjudicatee of the property sued to effect a partition declined to comply with his bid. The court compelled compliance on the ground that the adjudicatee was protected by the order of court, and that the irregularities complained of were not such as to cast a cloud on the title tendered.

These cases are in line with the code and the jurisprudence of this State, and not in conflict with the early decisions of this court already referred to and the case now noticed, which interprets the Art. 1794 of the Civil Code. This article authorizes a party contracting with an incapacitated person on discovering error to call on the person having charge of the incapacitated person for a family meeting to affirm or annul the contract. In the case Cavalier vs. Germain, 6 La. 215, the plaintiff sued out a rule on the defendant to show cause why he should not comply with his bid on a house and lot adjudicated to him.

The defendant alleged that the tutrix could not give bond until two days after the adjudication. The tutrix, two days after the adjudication, submitted to the deliberations of a family meeting whether it was for the interest of the minors to have a new adjudication made or the one to defendant ratified.

They recommended the latter.

The court held that the ratification by the family meeting was of no avail without the consent of the defendant.

The *syllabus* is as follows: "The subsequent ratification of a sale made under such circumstances by a family meeting on the application of the purchaser might have rendered the adjudication valid, but such ratification is of no avail when obtained on behalf of the minors."

Under the plain textual provisions of Art. 1794 of the code, and the authority of this case, we do not think that the subsequent ratification by a family meeting, without the assent of the defendant, made valid the sale of the property to defendant.

The contract was imperfect and could not be perfected without the assent of defendant.

An imperfect title was tendered to defendant and she was not compelled to accept it.

Judgment affirmed.

No. 9741.

ERNEST PUECH ET AL. VS. MRS. CELESTINE DARET.

Notwithstanding the affairs of the Consolidated Association of Planters of Louisiana are in process of liquidation in a Federal court, a court of this State is quite competent to entertain, and, on sufficient proof, make absolute a rule taken for the cancellation of a mortgage resting on property against which another special mortgagee is proceeding by seizure and sale on a competing mortgage.

APPEAL from the Civil District Court for the Parish of Orleans. *Monroe, J.*

T. J. Semmes & Legendre for Plaintiffs and Appellees.

Joseph P. Hornor for Defendant and Appellant.

M. J. Cunningham, Attorney General, for the State, Appellant.

The opinion of the court was delivered by

WATKINS, J. Ernest Puech obtained an order of seizure and sale against defendant's plantation, in the parish of St. James, in the enforcement and foreclosure of a special mortgage securing payment of a note of $5500 with interest.

Pending advertisement of same for sale, Mrs. M. Daret, Pierre Pootz and plaintiff presented a petition to the court to the effect that Mrs. M. Daret is the present owner and possessor of the plantation mortgaged, by purchase from Mrs. Celestine Daret, and that long antecedent thereto Armand Duplantier had subscribed for thirty-seven shares of the stock of the Consolidated Association of Planters of Louisiana, and mortgaged said property to secure the same, and a loan of $9250 additional, and on which said shares all loan instalments and contributions have been paid.

That the amount of said stock mortgage is greater than the actual value of the land, and if paid nothing would remain of the proceeds of sale when realized to apply to petitioner's mortgage; but as said indebtedness no longer exists, the inscription of the mortgage should no longer remain as an apparent incumbrance on the land, to their detriment; and they allege themselves to be entitled to have same canceled, and they pray for the cancellation thereof.

The State of Louisiana, being a party defendant, excepts that the same question is at issue in a suit now pending in the United States Circuit Court, entitled Cressy vs. Consolidated Association, and adopts the exception taken by John Calhoun, receiver, which is to the effect that he declines the jurisdiction of the Civil District Court on the ground "that he can not be sued as receiver before the court that appointed him * * unless by permission of said United States Circuit Court, which has not been granted."

From a judgment overruling these exceptions, and making the rule absolute, the State and receiver have appealed.

The exception urged is the same in principle as the one tendered and overruled in Lanaux vs. Recorder, 36 An. 975, and to which suit the State was a party, and in the course of our opinion we said:

"This is a proceeding to compel a ministerial officer to do what is alleged to be his manifest duty in a matter wherein it has been

judicially declared the State has lost all interest," etc. Also the court said:

"The point made that this court is without jurisdiction because receivers have been appointed for the Consolidated Association by the United States Circuit Court, is untenable when the object of the proceeding is to erase from the mortgage book of the State an incumbrance created by her law, and which the Circuit Court of the United States would have no authority to order."

We can not see any force in the objection, and are of the opinion that our decree in the Lanaux case is controlling. This court is clearly competent to entertain the rule and decide it, notwithstanding the affairs of the Consolidated Association of Planters of Louisiana are in process of liquidation in the courts of the United States.

In State ex rel. Laloir vs. Consolidated Association and the Recorder, 43 An. 838, all of the questions herein raised were gone into and decided in keeping with the views expressed in the Lanaux case.

From our opinion in that case, it appears that the case of Cressy vs. Consolidated Association, referred to as then pending in the United States Circuit Court, has since been decided by the Supreme Court of the United States, and on the principles announced in Association vs. Lord, 35 An. 438—a parallel case—maintaining the plea of prescription and directing the cancellation of the mortgage.

This case has been kept under advisement for several years on account of the pendency of the Cressy case; and now that it has been finally decided, there is no occasion for longer delay.

For the reasons assigned in the decided cases referred to *supra*, our judgment must go in favor of the plaintiff—the evidence being conclusively in favor of the rule.

The judge *a quo* decided the case correctly in making the rule absolute.

Judgment affirmed.

The Chief Justice and Mr. Justice Breaux not having been present when this case was submitted, take no part.

No. 11,286.

THE STATE OF LOUISIANA VS. FREDERICK FRISCH.

So far as the right of the State to pursue and punish a criminal is involved, the subsequent ratification of the act by the party injured will not bar a prosecution by the State.

APPEAL from the Criminal District Court for the Parish of Orleans. *Moise, J.*

M. J. Cunningham, Attorney General, and *Lionel Adams* for the State, Appellee.

Evans & Dunn for Defendant and Appellant:

1. The defendant was the agent of Gassner & Co., in New Orleans, engaged in cotton speculations.

   Heavy losses occurred between March and August, 1892. Defendant overdrew his account during that time. On the 28th of August, 1892, after some controversy about the share of losses each was to bear, it was finally agreed that this defendant's share should be $10,590.31. On the 10th of September, 1892, Gassner & Co. served on defendant an account current in conformity with that agreement, and asked defendant to acknowledge in writing its correctness, and thereupon defendant gave his written acknowledgment as requested. In that way the final settlement and compromise agreement was reduced to writing, in conformity with the code, Art. 3071. Antoin vs. Smith et als., 40 An. 569; Calhoun vs. Lane et als., 39 An. 596.

   On October 6, 1892, defendant was arrested and charged with embezzlement said to have been committed in April, 1892.

   Defendant claims that the settlement made and reduced to writing, as above related, was a ratification of all his acts, legal and illegal, up to September 10, 1892.

   That by the compromise agreement Gassner & Co. deprived the transaction in question of its *tortious* aspect and made it a matter of *account*. It established the relation of debtor and creditor between them.

   In a civil action, Gassner & Co. would have to rely upon the compromise settlement and agreement. They would not be permitted to select any one item in that account and sue on it. Robertson vs. Wilcox et al., 3 An. 94-96.

   The compromise agreement "settled" whatever wrong there was, if any there were. Oglesby vs. Attrill, 15 Otto (105) U. S. R. 611.

2. A principal may ratify the agent's wrongful use of his money or property. Cook vs. Tullis, 18 Wall. U. S. R. 332, 338, 340; Ogden vs. Marchand, 29 An. 61 (Syllabus); Mancell vs. Payne, 18 An. 125; Warneken vs. Marchand, 18 An. 147; Rex vs. Levy, 4 Car. P. 241; People vs. Hurst, 62 Mich. R. 276 (28 N. W. Rep. 838); Challis vs. Wylie, 11 Pacific Rep. 438; Mulford vs. People, 28 N. W. Rep. 1096.

   It is a principle of law well settled that every ratification relates back to the time of the doing of the act.

   "It operates upon the act ratified precisely as though authority to do it had been previously given." Cook vs. Tullis, 18 Wall. U. S. R. 338; Bloodworth vs. Jacobs, 2 An. 23, 24; Dunbar vs. Bullard, 2 An. 810; Szymanski vs. Plassan, 20 An. 92; Raymond, etc., vs. Palmer et als., 41 An. 485.

   The act complained of in this case was ratified by Gassner & Co. on the 28th of August, and again on the 10th of September, 1892; therefore, that act was legal at the time this criminal prosecution was commenced.

3. "If the prisoner regularly admits the receipt of the money, the mere fact of not paying it over is not felony. It is but a matter of account." Russell on Crimes, 2 Vol., 9th Ed., 452; Archibold Cr. Pr. and Pl., 2 Vol., 7th Ed., 579 (Waterman's notes).

4. There was evidence of ratification before the jury and it was error to refuse instructions upon that point.

The trial judge says: "There was no ratification of any of the defendant's authorized or unauthorized acts." That was a question for the jury to determine. State vs. Thompson, 45 An.; State vs. Tucker, 38 An. 540, 791; State vs. Wright, 40 An. 592, 593.

The opinion of the court was delivered by

McENERY, J. The defendant was convicted of embezzlement and has appealed.

In the brief of defendant it is stated, "We abandon all bills of exceptions in the record except the fourth bill of exception."

The fourth bill is as follows:

"Be it remembered, that on the 27th day of February, 1893, this case came up for trial, as appears in evidence; that a Mr. Jules Sugg, one of the witnesses for the State, reached New Orleans on the 6th day of August, 1892; that defendant was absent from the city at the time, for the benefit of his health; that as soon as he learned that Mr. Sugg, a partner of the firm of Gassner & Co., was in the city, the defendant returned to the city as soon as possible; that he reached the city on the 26th day of August, 1892; that on the 28th day of August, he, the defendant, and Mr. Sugg, of Gassner & Co., met in their office, had a long and full conversation concerning the losses of Gassner & Co., *and the defendant*, whereupon Mr. Sugg asked the defendant for a full and complete statement of the entire transaction, to make a full and complete written statement, that he, Sugg, might forward same to the Liverpool house of Gassner & Co.; whereupn the defendant then and there made out a written statement, fully, truthfully and fairly, showing how the losses occurred, and delivered same to Mr. Sugg, who read it over carefully and mailed it to the Liverpool house. It would be well for the court to be informed that a settlement had been proposed by Mr. Sugg, that the defendant should assume all the losses, amounting to thirty-six thousand eight hundred and sixty-six dollars and fifty-one cents ($36,866.51).

"That defendant declined to assume the losses which had occurred in speculation in the name of Gassner & Co. and for their

account; *that he did assume the responsibility for the losses of the money which he had overdrawn and used and lost for his own account.*

"That on the 10th day of September following Mr. Sugg served upon defendant an account current, which is to be found in record page———, in which each item of overdraft from its date was mentioned, together with the charge of interest from its time of overdraft up to the first day of September 1892, together with certain law charges of the firm of Gassner & Co., contracted, all of which will more fully appear by an inspection of said account current; that after the second account current had been served as above mentioned, Mr. Sugg, of the said firm of Gassner & Co., requested the defendant to acknowledge the correctness of the said account current in writing, which the defendant promptly acknowledged; that on the 6th of October of the same year the defendant was arrested and taken before the First Recorder's Court and, after due proceedings had there, the case was transferred to the Criminal District Court.

"That at no time after the return of the defendant on the 26th day of August was any controversy held between the defendant and the firm of Gassner & Co., except when Mr. Sugg wanted the defendant to assume the responsibility of the entire losses, amounting to $36,866.51, at which time it was agreed that the defendant's loss should be the sum of $10,590.31, as appears in said account current. That on the trial and during the argument it was contended by defendant's counsel that the whole transaction had been ratified by Gassner & Co., through Mr. Julius Sugg, and that the *tort*, if there was a *tort*, in connection with the entire transaction was entirely removed by the action of Gassner & Co., as related above."

And the trial court was requested to charge the jury as follows:

"The general rule as to the effect of a ratification by a principal of the unauthorized act of his manager or agent is well settled. The ratification operates upon the act ratified precisely as though authority had been previously given. The principal may ratify the wrongful use of his money or property by his 'manager' or agent, and thereby establish the relation of debtor and creditor between them. Such ratification will remove the *tort* or *wrong*."

On the refusal of the trial judge to charge the jury as above, counsel for the accused reserved this their fourth bill of exceptions.

Upon this bill the following endorsement was affixed:

Per curiam. " I *can not concur* in the statement of facts as given in this bill. There was no ratification of the defendant's authorized or unauthorized acts. Where the victimized firm suffered losses by reason of the defendant's unauthorized transaction, *suit was brought* against third persons and *a great portion of the money recovered. Criminal prosecutions* were instituted *as to others.*"

The indictment charges the defendant with embezzling $200, which was one of the items in the account current submitted to Gassner & Co.

There was evidence before the jury of ratification by Gassner & Co. of all the unauthorized acts of the defendant, and had the proof been sufficient, as alleged by defendant, the law applicable to the ratification by a principal of the unauthorized acts of the agent would be applicable in a civil suit between the principal and the agent.

But it has no place in a criminal prosecution when the act is of such character as to involve a crime denounced by the State as opposed to public policy. Embezzlement is an offence of this character. The loss to the individual is a matter personal to himself. It is optional with him to recover the amount due him in consequence of the embezzlement in the implied contract to reimburse him. But the crime concerns the public policy of the State, and no agreement, compromise or ratification can make that which she has denounced as a crime an innocent act, relieving the offender from the punishment attached to it.

The offence of embezzlement is of that nature which the public takes notice of as injurious to itself. 1 Bishop, Criminal Law, paragraph 232.

Mr. Bishop says in the paragraph referred to: " Nothing can be more purely a *tort* to the individual alone than a simple larceny where there is no breach of the peace; no public loss of property, since it only changes hands; no immorality, corrupting the minds of the young; no person in any way affected but him who takes and him who loses the thing stolen. And as in larceny, so it is in many other crimes; a public offence is committed, while only an individual suffers."

Any agreement to suppress the crime would be contrary to public policy and void, as the State has the right to pursue and punish the criminal. Meecham Agency, par. 116; Thisler vs. Vandike, 82 Pa. 447; McHugh vs. County, 67 Pa. 391.

The case of Faquer vs. Knox, 66 New York, 525, was for malicious prosecution for the crime of embezzlement. The court, upon request, charged: "If you find that the defendant, prior to the complaint against the plaintiff charging him with embezzlement, settled with the plaintiff for the moneys, the defendant afterward charged the plaintiff with having embezzled as and for a debt on a contract, expressed or implied, such fact would be evidence that the defendant did not believe the plaintiff had embezzled the said moneys."

On appeal to the Court of Appeals the charge was held erroneous.

Chief Justice Church in the opinion of the court said the effect of the charge "was to produce an erroneous impression;" the effect of it was to convey the idea that the settlement and payment of the amount claimed by defendant was evidence that no crime had been committed, and the defendant did not believe that there had been.

The defendant had a legal right to settle with the plaintiff and to receive payment for the amount abstracted as and for a debt upon an implied contract, and such settlement was no bar to a criminal prosecution, nor did it furnish evidence that the defendant did not believe that the money had been embezzled.

In the case of People vs. Hurst, 28 N. W. R., page 838, relied upon by defendant, there was no question raised as to the "ratification" of the acts which constituted the embezzlement.

It was a question of felonious intent, whether the mere failure to pay the money indicated a design to cheat and deceive the owner.

A candid admission of the debt was made at once on inquiry, and partial payment was made and security given at different times for the debt.

No such question is presented here. The bill does not present the question whether or not the transaction between the parties had assumed the shape of the facts in the above case.

The bill of exceptions does not show that previous to the settlement the transaction assumed the shape of debtor and creditor, or that in the settlement offered in evidence there was any such relation between the parties other than the implied contract to make restitution for the amount embezzled.

The defendant was convicted. We must presume that all the constituent elements of embezzlement were proved, and among them, concealment. On this point there is no conflict. The question, then, is did the presentation of the account to defendant, or, as is alleged,

the account presented to Sugg, made out by defendant at Sugg's request or demand, showing his wrongful use of money in the management of the business, his acknowledgment of the account, and his promise to pay the amount converted by him, and his refusal to assume other obligations, constitute such a state of facts as to make the business relation between the parties that of debtor and creditor. We think not.

The embezzlement had been committed. No transaction between the parties could have prevented the prosecution, which was not to enforce any right of the prosecutors, but to punish a crime committed against the State.

Judgment affirmed.

No. 11,190.

ANDRIS JOCHAMS VS. RICHARD M. ONG.

The plaintiff sold cement to the defendant, subject to a test.

During the delay required to test the cement the defendant was to have possession.

The bill of lading representing the cargo was tendered to the defendant, who refused possession. The plaintiff in thus tendering complied with his obligation as vendor.

The defendant violated the conditions by not receiving the goods.

After the defendant had refused to receive the property, the plaintiff did not sell the goods, but kept them a considerable time, and did not attempt to minimize the damages.

The damages allowed are the price the defendant bound himself to pay, less the market value of the article.

APPEAL from the Civil District Court for the Parish of Orleans. *King, J.*

Howe & Prentiss for Plaintiff and Appellant.

White, Parlange & Saunders for Defendant and Appellee.

The opinion of the court was delivered by

BREAUX, J. In the summer of 1891, through agents in New Orleans, the plaintiff, of Charleroi, Belgium, offered to sell to the defendant a cargo of cement on board of a vessel, which was expected to arrive at the port of New Orleans on or about July 1 of that year.

The defendant agreed to buy of plaintiff this cargo, of 8372 barrels, at $1.73, and to pay the import duty.

The terms of the sale were payable ninety days from the date the vessel began unloading, and the defendant to give his acceptances only after he was satisfied by a test of samples of the cement. These samples were to be sent by him to an expert in New York so that he would know that it actually tested 350 pounds tensile strength.

Under their agreement, which was verbal, the defendant was to receive possession of the vessel on its arrival, so that he could reduce his expenses and have the cargo discharged at a point of his selection.

Plaintiff drew drafts for the amount, which drafts were received by J. W. Seligman & Co., his correspondents in New York.

They were subsequently received from Seligman & Co. by the Louisiana National Bank and were, by the latter, presented to the defendant for payment before the arrival of the vessel in New Orleans.

The total amount of these drafts was $14,486.26.

The letter of advice in which the drafts were enclosed contains the following:

"Drafts to be accepted due three months from date of arrival of vessel and documents to be delivered upon acceptance."

Acceptance was refused, the defendant claiming that he was not to accept drafts until the cement could be tested and found satisfactory.

On the 20th of June, 1891, the defendant addressed a letter to the collecting agent declining to accept these drafts, correctly stating the terms of acceptance and payment, and claiming possession of the cement upon arrival of the vessel.

The New York correspondents were informed of the refusal to accept the drafts. In their answer, addressed to the local agent, they state:

"When we sent you the drafts we asked you not to present them until after arrival of goods; as to the examination (or test) we are not advised, but we would grant the delay."

All parties agreed that the defendant should, under the contract, have possession of the cargo on the arrival of the vessel without accepting the drafts, before the "test" had been made and found satisfactory.

Subsequently the bank, through one of its officers, the law firm for plaintiff represented by a law student in their office, and the defendant, met and discussed the conditions of the sale and delivery of the cement.

The two witnesses for plaintiff, viz.: the bank officer and the law student, testify that the bill of lading was tendered without any reference whatever to the drafts which the defendant was to accept later if the "test" of the cement proved satisfactory.

Before the arrival of the cargo the defendant had made preparations to take possession of the cement and to warehouse it for safekeeping free of charge.

The controlling idea of the defendant at the time obviously was that the contract secured to him not only the possession of the cement, but also the right to sell.

His possession, he declares as a witness, "was to include the right to sell."

The contract proves that until the test was made and found satisfactory the defendant was to have possession; nothing is said as to the right to sell.

The letter in reference to the contract addressed to the plaintiff by his agents here states:

"When the cargo of cement comes here Mr. Ong will have it tested, and as soon as he has returns of tests he will send you his notes. While awaiting the result of the tests he will, however, care for the cement, and when notes are given they will be dated the day the vessel unloads, so that delay in testing does not result in disadvantage to you."

The testimony of witnesses is that the sale was to be concluded after the test.

The defendant alleges in his answer that it is true that he agreed to purchase from said plaintiff a cargo of cement, ex sailing vessel Auguste, to contain about 8000 barrels.

That he was to pay $1.73 a barrel, and import duty amounting to $2679.04.

That it was expressly agreed that the cargo should be put in his possession, and under his control, so that he might control the landing and storing of the cement.

The pleadings properly do not disclose any such claim as a right to sell, for the facts would not sustain such a claim.

Moreover, "things of which the buyer reserves to himself, the view and trial, although the price be agreed upon, are not sold until the buyer be satisfied, which is a kind of suspensive condition of the sale." R. C. C. 2460.

The right of defendant was therefore a right of possession temporarily, to be followed by a sale if the cement had the strength the vendor said it had. Had he accepted the bill of lading tendered, it would have given him control of the landing and storing of the cement.

A negotiable instrument such as a bill of lading for delivery of certain goods to order confers right of possession.

Under the terms of the contract the collecting agent was authorized to deliver this bill of lading; its transfer, as proposed, would have, beyond question, placed the defendant in possession.

The authority of the cashier to deliver the bill of lading was not at any time the objection, but the right denied him to sell that was asked of this officer and which he declined to grant.

Plaintiff's witness, the cashier of the Louisiana National Bank, states that on the 26th or 27th of June the bank, through him, tendered the bill of lading to the defendant and informed him that he could accept the drafts after the "test."

The defendant declined to receive the bill of lading unless he was given permission to sell as much as he could of the cement while awaiting the test.

The witness Wolf, the law student, who acted for plaintiff's agent in New Orleans, was called on by the defendant regarding this alleged right.

This witness Wolf testified that while the cashier was willing to deliver him the bill of lading without acceptance of the drafts, he was not willing to permit him to sell any part of the cargo while awaiting the test, that this was part of the contract, and that he called upon him to decide this difference.

The witness says: "I again visited Mr. Janin with him and told Mr. Janin that it was not part of the contract that Mr. Ong should sell any part of the cement while awaiting the result of the test. Mr. Janin then again offered him the bill of lading without signing the notes or accepting the drafts, but said he would not give him the right to sell."

Subsequently the defendant wrote to plaintiff that his correspond-

ents in New York declined positively to put him in possession unless it was understood that he would make no sales.

On the day preceding the arrival of the vessel the defendant agreed with the cashier and the witness Wolff to write to Seligman & Co.

The defendant in this letter again applied for a right to sell while awaiting the result of the test.

The two witnesses for plaintiff state that the defendant agreed to await a reply to the letter before deciding as to what he should do.

The day of the arrival of the vessel the defendant wrote to plaintiff's agent that he had just been advised of the arrival of the vessel; that the uncertainty of his obtaining possession will occasion loss to him; that he could have arranged to have the vessel landed at a point where the saving to him would have been considerable.

He informed them of the facilities he had for transporting and storing the cement, and expressed a willingness to cancel the contract.

On the next day, when informed by the cashier of the bank of the answer of the New York correspondents declining his proposition in some respects, he refused to have anything further to do with the contract.

The defendant had been offered possession, which he had declined unless he was given right to sell the cement.

This right to sell was insisted upon at all times.

It was the only cause of difference between the parties.

The tender was made, which the defendant did not accept.

He was in default from that date and responsible as a proposed vendee.

The property sold proved of the required strength, and the vendor complied with his obligation to deliver it at this port.

After the arrival of the vessel plaintiff and defendant, through their agents, joined in sending samples of the cement to a Captain Maclay, of New York, an expert, for the purpose of testing its tensile strength. In about three weeks he mailed to them his certificate, showing satisfactory strength. Again the cement was tendered, and again was refused.

There were two errors committed, the first by the defendant in not receiving possession when it was offered to him; the other error was committed by the plaintiff in retaining possession of the property

seven months after the arrival of the cargo without any action on his part to compel compliance and relieve himself of the responsibility for the property.

Plaintiff sues for a loss of $4098.31, occasioned, he alleges, by defendant's non-compliance with the contract.

With reference to damages. The vendor has a right of action against the purchaser for his breach of contract in not receiving the goods sold.

The measure of damage, it is generally held, is the difference between the agreed price and the market value of the goods at the time they were tendered and refused, in addition to the costs and other damages.

There is no evidence before the court satisfactorily establishing the necessity of waiting to effect a sale.

The sale should have been made at the earliest practicable period after an absolute refusal to accept.

The market value of the goods at the time of the tender is not proven.

The price paid for them seven months after is apparently a fair value.

By agreement, without prejudice to the rights of either party, the cargo was sold to plaintiff for $1.90 a barrel cash, to be deducted in the event plaintiff recovered judgment.

The perplexing and exceptional character of this case has forced upon us the conclusion that the full measure of damages should not be allowed.

The facts and circumstances are such that we have determined to limit the amount to the actual sum promised by the defendant, and to thus minimize the damages:

Amount price of the cement	$14,483 56	
Import duty	2,679 83	$17,163 39
Less price at which sold	$15,906 80	

It is therefore ordered and decreed that the judgment of the lower court is avoided and reversed, and it is now ordered and decreed that there be judgment in favor of the plaintiff for the sum of $17,163.39, subject to a credit of $15,906.80, with legal interest on the amount of the judgment from judicial demand, and that defendant pay the costs of both courts.

Parlange, J., having been of counsel, recuses himself in this case.

Rehearing refused.

No. 11,318.

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C. C. WILLIAMS ET AL. VS. THE JUDGE OF THE EIGHTEENTH JUDICIAL DISTRICT COURT FOR LAFOURCHE PARISH.

1. Private property can not be taken unless for purposes of public utility. What constitutes public utility and public purposes is for the courts to determine.
2. Under Act 132 of 1890, expropriation suits may be tried in vacation.
3. Where the proceedings are not void on their face, and show no arbitrary action on the part of the respondent judge, the writ of certiorari will be refused.

APPLICATION for Certiorari and Prohibition.

Clay Knobloch & Son and *W. P. Martin* for the Relators.

Beattie & Beattie for the Respondent.

The opinion of the court was delivered by

PARLANGE, J. Relators allege that seven suits for the expropriation of lands belonging to them have been brought against them by the Laurel Valley & Rousseau Station Railroad Company, "a pretended corporation claiming to have been organized under the laws of this State for public purposes, to-wit: to carry freight and passengers from the Laurel Valley plantation, in Lafourche parish, to and from Rousseau Station, a flag station on the Southern Pacific Railroad." That the district judge endorsed on each petition an order allowing the same to be filed, and directing the clerk of court to give notice, according to law, to the owners of the lands described in the petition; that a copy of said order was served on each of said relators, and that if any other order exists, the same has not been served on relators; that citations were served on them to appear at chambers in the town of Thibodaux on a specified day, said citations stating that the cases were to be tried then and there before a jury, but that no hour was fixed in said citations, nor was any order of court served upon relators showing that the trial of the cases had been fixed for said day and was to be had at chambers, and that the cases were to be tried by a jury. That on the day specified relators appeared before the court at chambers simply to except and protest that the plaintiff in said suits is not a corporation organized for public purposes, but is a combination of individuals whose sole

object is to foster the private ends of two certain persons named, who own jointly two sugar plantations in Lafourche parish, about five miles distant from one another, and who wish to transport the sugar cane grown on one of the plantations to the refinery situated on the other. That relators protested against the trial out of regular term time of the issue raised by them, and claimed the right to issue commissions to take the testimony of witnesses residing out of the parish for the purpose of proving relators' contention. That the district judge overruled the protest, refused to allow the commissions to issue, and insisted on proceeding at chambers to the trial of said exception and of the merits of said causes. Relators pray for writs of certiorari and prohibition, and that all said proceedings at chambers be set aside.

The district judge answers that said suits were filed in court on June 15, 1893, after he had endorsed on the petitions therein an order directing the clerk of court to file the same and to give notice to the owners of the different parcels of land. That on July 7, 1893, under Sec. 1480, Revised Statutes, at the court house, in the room appropriated to the regular sessions of the court, the causes came up for trial in chambers, the court not then being in term time. That relators excepted that the plaintiff in the suits was not a public corporation, but a private enterprise, and that relators were entitled to a delay to take out commissions to prove this fact, and that the issue could not be tried at chambers. That after argument respondent ruled that the issue could be tried at chambers; that he refused the delay asked for, because the facts desired to be proved by non-resident witnesses could be as easily and as conveniently proved by witnesses residing in the parish, but he granted time to procure the attendance of the latter.

The railroad company answers that it is a corporation duly established under the law of the State; it declares itself to be a common carrier and its roadbed a public highway, under Arts. 243 and 244 of the Constitution. It avers that it was lawfully proceeding to expropriate the lands of different persons to obtain its needed right of way. That the charge that it is a private concern is untrue, as will be conclusively proved on the trial of the suits. That it has so far been unable to introduce its evidence on the issue raised. That the matter was being heard on relators' exceptions, when relators, who had not concluded their own testimony, by application to this court for writs

of certiorari and prohibition, prevented the respondent corporation from making any proof. That all of said suits are appealable to this court. That the capital stock of said corporation amounts to $15,000, and that all of its rights will be destroyed unless it can expropriate the lands between its termini. That the issuance of the orders from this court has damaged said corporation in the sum of $2500, which it prays may be awarded to it, if it is within the power of this court to do so.

The president of said corporation has filed a sworn statement in this court that the interest of the corporation in each of said suits amounts to $15,000, the full value of its stock.

The property of the citizen can not be taken from him "unless for purposes of public utility."

"Private property shall not be taken nor damaged for public purposes without just and adequate compensation being first made." Constitution, Arts. 155, 156; Civil Code, Arts. 497, 2626, *et seq.* Art. 11 of the Constitution declares that "all courts shall be open and every person for injury done him in his rights, lands, goods, person and reputation, shall have adequate remedy by due process of law, and justice administered without denial or unreasonable delay." In the case of New Orleans Pacific Railway Co. vs. Gay, 32 An. 474, this court said:

"To entitle the public to take private property two things are necessary: first, the interest of the public must require it, and second, adequate compensation must be made."

Relators have the undeniable right to contest in the courts with the railroad company the question whether its purpose is one of public utility, and whether the use to which it seeks to put relators' property is a public use.

What constitutes public utility and public purposes is for the courts to determine. Lecoul vs. Police Jury, 20 An. 308; Lewis on Eminent Domain, Sec. 148.

"Where, under a general railroad law, a road is built for private use, its operation may be enjoined at the suit of an individual, or the franchise annulled at the suit of the people." Lewis on Eminent Domain, Sec. 170.

But it does not follow that relators are entitled to the relief they ask. Since the decision of this court in the case of Telegraph Co. vs. Railroad Co., 39 An. 659, in which it was held that suits for the

expropriation of property could not be tried at chambers, Act 132 of 1890 has been passed, providing that whenever any proceeding is instituted under Secs. 1479, 1480 and 1481 of the Revised Statutes for the expropriation of lands for public purposes the suit may be tried in vacation.

Relators contend that Act 132 of 1890 does not apply to the suits brought against them, because they are suits to expropriate their lands for private purposes. But this contention is without force. The suits, whether well founded or not, are within the description of the suits which the act makes triable in vacation, and the district judge had the right to try them at chambers, as also the issue raised by relators.

This court has held that it would not issue the writ of certiorari unless the proceedings are void on their face. The proceedings in this matter are not void; there is no arbitrary action here which entitles relators to the writ. The jurisdiction of the District Court is clear and the writ of prohibition does not lie.

We have no occasion in these proceedings to review the refusal of the district judge to allow the commissions to issue to take the testimony of non-resident witnesses, or the correctness of his rulings during the hearing of the issue raised by relators, to which rulings they reserved bills of exception. Such an inquiry would pertain to a court in the exercise of its appellate powers.

The district judge gave relators timely notice of the proceedings. It was fully effectual in causing relators to appear in ample time to make any defence they might have. Relators' counsel state in their brief that they convinced the district judge that the issue raised was a judicial question. The district judge ruled however that the issue was triable at chambers, and proceeded to try the same. While he refused the delay for the issuance of the commissions he granted time to relators to summon their witnesses. These were heard during two days, and until the proceedings were arrested by the order of this court. Relators seem to have interrupted the hearing of their own evidence. The railroad company has not yet had an opportunity to produce evidence. It may be that relators will succeed in maintaining their position before the district judge. Three of the cases are conceded by relators to be appealable to the Court of Appeals. The railroad company urges that all the cases are appealable to this court, and that any error in them can be remedied here

on appeal. However this may be, it is clear that relators are not entitled to the writs.

Application dismissed at relators' costs.

No. 11,310.

THE STATE OF LOUISIANA EX REL. JEAN DUFFARD VS. HON. E. S. WHITAKER, RECORDER.

1. A judge who refuses to grant an appeal in an appealable case, on the ground that the issues raised had been repeatedly determined by the Supreme Court adversely to the contention of the party moving for the appeal, and that the applicant was through his motion seeking to abuse the right of appeal acts unjustifiably. He has nothing to do with the motives prompting the exercise of the legal right nor the final result of the controversy.
2. Though the rulings of a judge in a cause be erroneous he is protected in that cause from liability for resulting costs, from motives of public policy.

APPLICATION for Writ of Mandamus and Certiorari.

James C. Walker for the Relator.

Louque & McGloin for the Respondent.

The opinion of the court was delivered by

NICHOLLS, C. J. Relator avers that on or about 23d of September, 1892, E. Gray, an inspecting officer of the Board of Health, assigned to duty in the city of New Orleans, made affidavit against him before the Hon. E. S. Whitaker, Recorder of the First Recorder's Court of New Orleans, complaining that relator had violated Ordinance No. 6596 of the city of New Orleans, approved August 4, 1892, by refusing to furnish upon demand a sample of the milk contained in the cans carried by relator in his wagon as a dairyman, and praying for his arrest and punishment for the said reason.

That relator was accordingly arrested and held to bail, and finally on the 24th May, 1893, relator was put upon his trial before said recorder on said charge, and thereupon adjudged to pay a fine of $25, and in default of payment to be imprisoned in the parish prison of the city of New Orleans for thirty days.

Relator avers that he did refuse to furnish the said health officer

with the required half pint of milk or sample, but not at all because the said milk was impure or adulterated; that said milk was not impure or adulterated, but on the contrary the same was equal in point of quality in all respects to the standard required by the laws of the State and the ordinances of the city of New Orleans, but that said refusal was based upon other considerations entirely, and had for its object to insist upon and to maintain his rights and privileges of liberty and property secured and guaranteed to him by the Constitution of the State of Louisiana and of the United States, and in the sincere belief that the provisions and requirements of the said city ordinance were in direct violation thereof, as he was advised and informed was really the truth and could be maintained.

Relator avers that said ordinance imposes a fine, penalty and forfeiture for such refusal aforesaid, and that said portion of the ordinance in question is unconstitutional, null and void for manifold reasons, which he pleaded specially and set up in his defence to said charge and affidavit before the said recorder of the First Recorder's Court or New Orleans, and which said pleas and defences were overruled by him on the trial, and among which said pleas and defences were the following:

1. That said ordinance is an unreasonable, odious and oppressive regulation, and interferes with relator in a lawful and industrial pursuit which is not injurious to the community, and disregards relator's constitutional privilege to be protected in the possession and enjoyment of his property.

2. That said ordinance compels relator to be a witness against himself in a criminal case within the meaning of the fifth amendment of the United States Constitution, and Art. 6 of the Louisiana Constitution.

3. Said ordinance is repugnant to the fourth amendment of the United States Constitution, and Art. 2 of the Louisiana State Constitution, and violates relator's right to be secured in his person and effects against unreasonable searches and seizures.

4. It violates the State and Federal Constitutions by depriving relator of his liberty and property without due process of law, because it subjects him to fine and imprisonment for refusing to furnish evidence against himself, which is not due process of law, and compulsorily confiscates the merchandise (milk) in which he deals without compensation, and therefore also deprives relator of the equal

protection of the laws. La. Const., Art. 6; La. Const., Art. 155; U. S. Const.

5. The said ordinance violates the fourteenth amendment of the United States Constitution for the foregoing and other apparent reasons.

Relator represents that all said reasons in substance, and many others also challenging the constitutionality of the said provision in the said ordinance, were by him specially pleadcd in his behalf in his defence to said charge, all of which were overruled and set aside as of no avail, and relator was fined as stated, and thereupon relator applied to said recorder to be allowed a suspensive appeal from said fine and sentence, and prayed that the same be made returnable to the Supreme Court as the law required on furnishing bond and security in such amount and conditioned as the law directs..

That the said recorder refused to allow said appeal from his judgment and sentence, and assigned no reason for the said refusal other than that the people of the city of New Orleans looked to him to suppress the selling of adulterated milk within the city limits.

That said recorder insisted that said fine of $25 should be immediately paid by relator, and on default of payment of said fine that relator should be immediately locked up and imprisoned and therefore under duress, and protesting that said fine and sentence and that said refusal to allow an appeal to the Supreme Court and threat of immediate imprisonment were unlawful, and, moreover, reserving all his rights to insist that said appeal should be allowed and granted as prayed for, relator paid to the clerk of the said First Recorder's Court, by direction of said recorder, the said fine, and obtained a receipt therefor as paid under protest and annexed to his petition.

Relator further averred that he was entitled to an appeal from the sentence of the recorder because the constitutionality of said ordinance and of the fine, penalty and forfeiture imposed thereunder are directly called in question, and that there is no other remedy to enforce relator's right to said appeal except to apply to the Supreme Court for a writ of mandamus to command the said recorder to grant said appeal, and for a writ of certiorari to the end that the said proceedings of the State of Louisiana vs. Jean Duffard (relator) be certified to the Supreme Court in order that their validity be ascertained. That he has notified the recorder of his intention to apply for said writs; that he is entitled to a return of the said $25 which

he has been compelled to pay under protest. He accordingly prayed that a writ of mandamus issue commanding the said recorder to allow relator a suspensive appeal from the sentence imposed by him against relator in the said proceedings, returnable to the Supreme Court according to law upon his furnishing bond and security according to law, and to return the said fine of $25, and for a writ of certiorari directing the said recorder to certify to the Supreme Court the said proceedings in order that their validity may be ascertained, and that the writ of mandamus be made peremptory and that said fine of $25 be returned to him; that he be allowed a suspensive appeal, and that the recorder be ordered to pay the cost of the proceedings.

Alternative writs having issued as prayed for, the recorder sent up the record as he was directed, and filed an answer in which he declared that he considered the demand for appeal herein, upon issues passed upon by the Supreme Court in several other cases, expressly or by implication, as an abuse; that he declined after imposing the fine to grant any order releasing relator from custody and relator, in default of such order for release, paid the fine; that all of said proceedings took place May 24, 1893, and relator did not proceed for mandamus until May 26, and respondent received no notice thereof until May 29; that, meanwhile, in due course, the amount paid by relator went into the city treasury as directed by law, and that respondent has no control and never had over the amount of said fine and can not be ordered to refund the same; that he acted in good faith, according to his best judgment, and in the public interest as the same appeared to him to demand and as a public officer; and he denies that he can be mulcted in the costs of this proceeding, even if the court should hold that he acted in any way erroneously, wherefore, submitting himself to the orders of the court, he prays that he be not, in any event, condemned to pay the costs.

An examination of the record sent up shows that relator, charged with the violation of an ordinance of the city of New Orleans, imposing as a penalty for its violation a fine of twenty-five dollars, and in default of payment thereof an imprisonment in the parish prison for a period of not over thirty days, contested on his trial the constitutionality and legality of the ordinance and the fine and penalty therein imposed; that the issues so raised by him were deter-

mined against him; that he was convicted of the offence and sentenced under the terms of the ordinance; that he applied at once for a suspensive appeal from this sentence, and that his application was refused. Relator was unquestionably entitled to an appeal under Art. 81 of the Constitution. The only reason assigned by the respondent judge for his action is that in his opinion the issues passed upon by him had on several occasions been decided by this court, either expressly or by implication, adversely to the relator's contentions, and that the relator was, through his motion, seeking to abuse the right of appeal. If the relator was, under the Constitution, entitled to have the judgment of the court below reviewed by this court, that right could not be impaired by any belief which the judge of the City Court might have as to improper motives having prompted the party convicted to claim the exercise of the right. That was a matter with which he had nothing to do. So far as the question of appeal was concerned it was no part of his duty to consider what this court had said or might say on the issues raised. State ex rel. Natal vs. Davey, 37 An. 828. The course pursued by him was totally unwarranted. Relator's rights in the premises have not been prejudiced by the payment by him of the fine imposed, under the circumstance of that payment. The respondent judge in his answer contends that even though he may have erred in declining to grant the appeal the costs of the present proceedings should not be thrown upon him, as he acted in good faith according to his best judgment and in the public interest as the same appeared to him and as a public officer. Although the action of the city judge in this matter was unjustifiable, reasons of public policy protect him from being made to pay the costs—they must be borne by the city of New Orleans.

For the reasons herein assigned it is hereby ordered, adjudged and decreed that the alternative writ of mandamus herein issued be made peremptory—costs of this proceeding to be paid by the city of New Orleans.

Mr. Justice Parlange takes no part.

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No. 11,343.

THE STATE OF LOUISIANA VS. LEE TAYLOR ET AL.

1. The State should not be permitted in a criminal case to cross-examine a witness for the defence on matters not growing out of facts and circumstances stated in his direct examination.

2. The legality of the cross-examination must be tested by the matters stated by the witness in his examination in chief, and not by the consideration of the purpose for which he had been introduced.
3. The court is not justified in permitting one of defendant's witnesses to be cross-examined as to matters not testified to by him on direct examination, for the reason that the same facts had been testified to by several witnesses both for the State and the defence, and the testimony was only cumulative. Cumulative evidence on the trial of the cause must not be confounded with cumulative evidence claimed to have been newly discovered and sought to be made available after verdict as a ground for a new trial.
4. Evidence of the statement of a third person that he alone was guilty of the crime charged was properly excluded. It was clearly hearsay.

APPEAL from the Eleventh District Court, Parish of St. Landry. *Perrault, J.*

M. J. Cunningham, Attorney General, and *E. B. Dubuisson*, District Attorney, for the State, Appellee.

E. P. Veazie for Defendant and Appellant.

The opinion of the court was delivered by

NICHOLLS, C. J. Lee Taylor, Tom Cosey alias Joe Thomas and James Martin were indicted in the District Court for St. Landry, for having feloniously stolen, taken and carried away a beef.

On the trial both Lee Taylor and the present appellant, Joe Thomas, were convicted and sentenced to hard labor. Taylor acquiesced in the judgment but Thomas appealed, and the judgment as to him was reversed and the case remanded for further proceedings. He was put upon his trial a second time and convicted, and from a sentence to ten months' imprisonment at hard labor he prosecutes this appeal.

His complaints are embodied in three bills of exception. In the first, he complains of the exclusion of testimony as to an alleged confession made by Lee Taylor after conviction and sentence, as he was about being sent to the penitentiary, to the effect that he Lee Taylor alone was guilty of the crime charged; in the second, that one of his challenges for cause was improperly overruled; and, in the third, that the State was permitted to cross-examine one of his witnesses as to matters not testified to in chief.

We think the evidence of statements made by Lee Taylor was properly excluded. It was clearly hearsay. See State vs. West, 45 An., and State vs. West and authories therein cited.

See also the case of Mitchell vs. Commonwealth (Ky.), 14 S. W. 489.

The bill of exception relative to the juror Conkling, who was challenged for cause by the accused and the challenge overruled, declares that "the juror being upon his examination on his *voir dire*, the following questions were asked, to-wit:

Q. Have you formed or expressed an opinion in this case?

A. Yes.

Q. Is that opinion a fixed one?

A. Not exactly.

Q. Do you feel able to go into the jury box and do impartial justice as a juror between the State and the defence?

A. Yes, if the evidence is the same I heard.

The defendant through his counsel then challenged the juror for cause.

The court thereupon further examined the juror, and he further said he was conscious of no bias or prejudice for the person or against him—further he did not know whether the reports he had heard were correct or not—whereupon defendant renewed his challenge for cause, which the court overruled on the grounds:

1. "Because the juror was closely examined by the court by questions in addition to those enumerated herein, and was satisfied by the juror's examination that the opinion which he had formed would yield to the evidence, and that notwithstanding said opinion his mind was free from bias and prejudice, and that he would render an impartial verdict."

2. "Even had the juror been incompetent the ruling of the court could not have prejudiced defendant, because of the fact that the juror Conkling did not sit on the jury, having been peremptorily challenged by defendant without exhausting his peremptory challenges, nine challenges remaining in his favor after challenging him." 43 An. 365.

The series of questions asked by the judge of the juror, which satisfied him that the juryman was competent, are not given. We must assume the questions and the answers thereto were such as to justify the court's ruling. But even if it were erroneous defendant has evidently suffered no legal injury therefrom. The third bill states that the defendant called to the stand a witness, to whom he propounded the two questions:

Q. State whether at the time you and your brother went to the

defendant's house on the night of the arrest you saw a piece of meat hanging on the gallery of the defendant's house?

To which question the witness answered "No."

Q. Did you not testify to that effect on the former trial?

A. No, I don't believe I did.

Whereupon the witness, being tendered to the State, was cross-examined as to what transpired at the time just previous to the visit made to the defendant's house on the night of the arrest by the witness, and as to what was said by the defendant at the time of said visit when questioned whether there had been a butchering at his house that day, and as to contradictory statements made by the accused on the occasion of such visit.

To such questions, and to further cross-examination on said subject, accused, through counsel, objected on the ground that the State could not, on cross-examination, question the witness of the defendant as to matters not testified to in his examination in chief in order to establish its case against the accused, (the State claiming the same right to cross-examine a witness as the defendant) which objection was overruled, and said questions and further examination allowed by the State upon matters not testified to by the witness on his examination in chief being admitted and further cross-examination permitted on the grounds:

1. That the purpose of the defendant was to establish the fact that a part of the stolen property was not concealed, but in full open view, and to also show directly and indirectly that the witness on another occasion had admitted as a fact that a part of the stolen property was not concealed, and because of this state of facts the court permitted the State to show that the only meat which the witness saw was secreted in an outhouse, which was locked on the inside, the defendant's son being therein, and that when first interrogated the defendant denied that a butchering had been made at his house, and subsequently, a few minutes thereafter, admitting that a beef had been killed and butchered by Lee Taylor. That this evidence was competent on cross-examination, it being closely related, in fact inseparably connected, with the matters and things inquired about in defendant's examination of the witness, and was proper to rebut the inference that the witness had testified differently on another occasion, and that even if the statements of the witness were illegally allowed it could not prejudice the defendant, inasmuch as several

other witnesses, both for the State and defence, had testified to the same facts, therefore the testimony of this witness was merely cumulative.

Upon a comparison of the two questions propounded to his own witness by the accused, and the answers to the same, with the questions and testimony drawn from that witness on cross-examination by the State, we are of the opinion that the cross-examination was permitted to take a range not warranted by what had been testified to on direct examination. The intention and expectation of the accused was to establish a specific fact, that on the night of his arrest a piece of meat was exposed to full view on defendant's gallery—the question went no further. The answer, doubtless to the disappointment of the accused, was in the negative. The testimony elicited utterly failed in its purpose, and the case stood as to that fact so far as that witness was concerned as if he had not been put on the stand. The answer left nothing for the State to rebut or to contradict. Defendant's attempt to prove and failure to prove the desired fact could but redound to his injury. We do not think that by the simple fact of asking the question the accused opened wide the door to proof of concealment and to proof of damaging, contradictory statements and admissions made by the accused.

In allowing the testimony the judge lost sight of the difference between the *purpose* which the defendant may have had in view on asking a question and the question itself and its answer. As said by this court in State vs. Stuart, 35 An. 1018, "The legality of the cross-examination in this particular must be tested by the matters stated in his examination in chief and not by the consideration of the purpose for which he had been introduced." State vs. Swayze, 30 An. 1327.

When the accused propounded the second question he evidently intended to challenge the veracity of his own witness, but the answer given negatived the fact he sought to bring out. Be that as it may, we think the subsequent cross-examination was not in aid of sustaining the witness' credit. There was no legal connection between the testimony brought out and the inferential claim on the part of the accused that *on a former trial the witness had sworn* that on the night of the arrest a portion of the stolen property was exposed on the gallery. The question is not whether the testimony was in its character relevant and admissible nor whether it

could have been properly elicited from other witnesses or even from this one under other conditions, but whether it could be elicited from him under the exact circumstances under which it was. 40 An.

If this particular witness could not be lawfully cross-examined as he was, the judge was not justified in permitting it, for the reason that other witnesses, both of the State and the defence, had testified to the same facts, and the testimony was merely cumulative. Cumulative testimony on the trial of a criminal case must not be confounded with cumulative evidence when such evidence is sought to be used after verdict as having been newly discovered as a ground for a new trial. The judge states the accused was not prejudiced, but it may have been on the weight and strength of the testimony of this very witness that the case turned. We do not know what weight the jury might have attached to the testimony of the other witnesses. We decline to dismiss this appeal for the reason that the action of the district judge making it returnable to New Orleans instead of Shreveport was, under the facts of the case, justified under Section 4 of Act No. 30 of 1878.

For the reasons herein assigned it is ordered, adjudged and decreed that the verdict of the jury and the judgment thereon rendered be set aside, annulled, avoided and reversed, and the case is remanded to the District Court for further procedings according to law.

No. 11,292.

A. P. DEBLOIS ET AL. VS. CITY OF NEW ORLEANS ET ALS.

A mandamus proceeding to compel the erasure of tax inscriptions from the mortgage records on the ground that same were improperly assessed involves the *tax* and not the *property;* and in case the amount of the taxes is less than $2000 this court has no jurisdiction *ratione materiæ.*

APPEAL from the Civil District Court for the Parish of Orleans. *Ellis, J.*

Theo. Cotonio for Plaintiffs and Appellees.

E. A. O'Sullivan, City Attorney, and *Henry Renshaw*, Assistant City Attorney, for Defendants and Appellants.

The opinion of the court was delivered by

WATKINS, J. Appellees move to dismiss this appeal on the ground that this court has no jurisdiction *ratione materiæ* of the subject matter of the suit, respondents being appellants from a judgment compelling them to cancel and erase certain tax inscriptions from the mortgage records, on the ground that the assessments thereof were null on account of certain informalities, the aggregate amount of said tax inscriptions being $930.60, a sum less than the lower limit of its jurisdiction.

Their contention is that, in a mandamus proceeding like the instant one, the question is the illegality *vel non* of the *assessment*, and not the legality of the *tax;* while that of the respondents is that the suit involves a question of title to the property—though improperly pleaded in such a suit—and it is worth more than $2000, thus seizing the court of complete jurisdiction.

We are of opinion that relators' contention is correct. While it is true that the respondents excepted on the ground "that according to the public records the relators are not the owners of the property in question, and have not the interest necessary to prosecute the suit," and in their answer denied the relators' ownership of the property and asserted their own, yet these self-serving allegations are unavailing for the purpose of converting a mandamus into a petitory action.

The case of Raymond vs. Villere, 42 An. 488, relied upon by the respondents' counsel, is not a parallel case.

That was an action by *mandamus* to compel the recorder of *conveyances* "to cancel from his books several inscriptions purporting to show *ownership* of certain real estate in this city, in various persons, made co-defendants;" and the court substantially held that the relator's petition disclosed no interest in him, as he had ceased to be owner, and that his action was palpably one in disguise to annul the titles standing in the names of other persons—therefore the issue presented was not legally determinable in that form of proceeding.

For the reasons therein assigned by the court for deciding that case in favor of the respondents, the demands of the respondents herein might possibly be sustained upon a trial of the merits; but in determining the jurisdiction of this court we must look through relators' spectacles.

There is a wide difference between a rule taken for the cancellation of a mortgage and one for the cancellation of an inscription of a conveyance: the former operating as an incumbrance *on* property, and the latter being an *accessory of the title to it.*

To our minds it is clear that this suit does not involve the title to the property, but the legality of the *assessment* of taxes only; and, as the taxes in question are less than $2000 in amount, this court has no jurisdiction—there being involved no question of the *legality* or constitutionality of the *tax* involved.

Of course we do not decide any question other than that of the jurisdiction of this court, as the case is presented on the relators' petition; but as a precautionary measure, we will fully reserve the respondents' right to contest in a proper form of action the relators' title of the property assessed.

Motion sustained and appeal dismissed.

Rehearing refused.

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No. 10,255.

AMANT BOURGEOIS VS. OCTAVE JACOBS. MRS. JULIA KUNEMANN, THIRD OPPONENT.

1. The mortgagor is not an essential party to a third opposition by a mortgagee contesting the validity and rank of other mortgages, and an answer on his part is in the nature of an intervention—he having not been cited.
2. In case the same person is sued by same plaintiff in two different courts at one and the same time, for the same cause of action, and without tendering the declinatory exception of *litis pendens*, answers both demands, the *first* judgment rendered by either court would be valid and executory against the party cast in the action.
3. The Federal jurisprudence on this question is the same as our own.
4. The judgment of the court *a qua* having decreed the cancellation of one of the mortgages contested by third opponent, and this mortgagee not having appealed or filed an answer to the appeal, the *debtor is without interest* and this court without jurisdiction to alter it.
5. The same is true of the purchaser who has appealed.
6. The judge having directed the sheriff to retain the proceeds of sale subject to the further order of court, and he having acknowledged service and waived citation, the purchaser agreeing to become the stakeholder in his stead and consenting to pay such judgment as may be rendered against him for the proceeds, becomes thereby a party to the suit, and such an agreement is tantamount to a confession of judgment, and no further citation is required.

APPEAL from the Twenty-second District Court, Parish of St. James. *Duffel, J.*

Charles Louque for Third Opponent and Appellee.

Sims & Pochè and *E. N. Pugh* for Defendants and Appellants.

The opinion of the court was delivered by

WATKINS, J. On the 7th of March, 1878, Octave Jacobs became the purchaser of a sugar plantation in the parish of St. James for the sum of $42,300, and of this he paid $15,000 in cash, and for the residue he issued a series of promissory notes payable to his own order, and same were by himself endorsed; and to secure the same he stipulated and consented to a special mortgage and recognized the vendor's lien on the property.

Amongst others, there were three notes—one for $3850, one for $1100 and one for $550—all of which matured on the 1st of February, 1889; and there was a stipulation in the act that the mortgage securing the payment of those three notes should have preference and priority over the security it gave to all others; in other words, those three notes were concurrently secured by a *first* mortgage, and all others by a *second* mortgage.

On the 10th of February, 1888, Amant Bourgeois procured an order of seizure and sale against the mortgaged property in the enforcement and collection of the note of $550 and interest, as secured by said first mortgage and vendor's lien.

On the 12th of March, 1888, during the pendency of those executory proceedings, Mrs. Julia Kunemann filed a third opposition on the grounds, substantially, viz.:

That she was the holder and owner of another of the series of notes which were issued by Octave Jacobs for $8000, made payable on the 2d of March, 1882, with 8 per cent. per annum interest from date and secured by the second mortgage contained in the act of sale.

That upon the mortgage certificate there appears mention of a mortgage in favor of the Consolidated Association of the Planters of Louisiana to secure the payment of the unpaid portion of the stock of said association, amounting to $40,000; that the shareholders have long since paid in on calls the sum of $612,000, which is and was more than sufficient to meet and discharge the whole of the indebtedness of said bank to its bondholders, or to the State as their subrogees, and no other debt is now due; that same was paid

to the officers of the State having the control of the affairs of the bank and is a full discharge and satisfaction of all claims which can be made by the State, or stockholders, and the said mortgage should be canceled and erased.

He prays to be paid from the proceeds of sale by preference over the seizing creditors the full amount of his note, with attorney's fees, interest and costs, and that the sheriff be ordered to retain said sums subject to the further order of the court; and it was so ordered.

The receiver of the Consolidated Association was cited in March, and the seizing creditor in April, 1888; and on the 26th of April, 1888, Octave Jacobs filed an answer and denied that any interest had run or accrued on the note held by opponent since the 2d of March, 1882, and averred that the act of sale to him contained a stipulation to that effect.

He further avers that, in a suit entitled Widow Cæsar Kunemann vs. Octave Jacobs, the plaintiff made claim for interest on said $8000 note, from and after the 1st of March, 1882, and, upon a trial contradictorily had, judgment was pronounced in his favor, rejecting her demand and decreeing that, under the stipulations contained in said act of sale, "no interest could be exacted pending the liquidation of said association."

He avers further that the affairs of said association have not yet been liquidated, and that neither interest nor capital of said debt can be collected because same are not due, for that reason; and he pleads the said stipulation and covenant in said act of sale and mortgage, and said judgment as *res judicata* and as evidencing the nonmaturity of said debt and interest. He prays for the rejection of plaintiff's demands *in toto*.

The seizing creditor answers that his claim—under which the property was sent to sale—is entitled to be paid by preference over that of opponent, from the proceeds of sale, the capital and interest of his note, attorney's fees and costs.

The receiver filed an exception to the jurisdiction of the court, and, this being overruled, he filed no answer and took no further part in the proceedings.

The judgment confirmed and made final the judgment by default taken against the Consolidated Association, and directed and decreed the recorder of mortgages to cancel and erase from the books

of his office any and all mortgages, and assumptions in favor of the same; overruled the various pleas of the defendant, Octave Jacobs, and decreed the opponent entitled to be paid the full amount of his demand, capital and interest; ordered and decreed that Ellen Mason, wife of Octave Jacobs, purchaser at sheriff's sale of the mortgaged property, should, *under her agreement to keep the proceeds in lieu of the sheriff*, pay the same, first to Amant Bourgeois, the amount of his debt, with interest, cost, etc.; and second to Julia Kunemann, opponent, the amount of her debt, interest, attorney's fees and cost, and directing the cancellation of the mortgages and liens securing same. From this judgment Octave Jacobs appeals, andn either of the appellees has filed an answer or requests any amendment of the decree.

Under this state of facts, it is manifest that no alteration can be made in the judgment, in respect to any one of the appellees. This court has no jurisdiction or power to do so. Inasmuch as the judge *a quo* found and decided that the stockholders of the Consolidated Association and the State had been fully satisfied, adjudged and decreed that its mortgage should be canceled and erased, and this decree remains unappealed from by the association, we are at a loss to perceive on what foundation Jacobs' right of appeal is predicated. His answer did not and could not deny the existence of the notes he had executed, and the mortgage he consented to secure their payment. It only asserted that the demand of opponent was premature, because the payment of the note she held had been procrastinated by its terms, and a covenant in the act of sale, *until* the affairs of the Consolidated Association should have been fully liquidated and settled. This, the judgment of the court declared, was an accomplished fact and ordered the cancellation of its mortgage. As he did not owe any part of the debt due the State or the stockholders, this cancellation was all the protection he or his vendee needed.

This legal purpose being attained, his other complaint ceases to be of any importance.

The receiver of the Consolidated Association having been regularly made a party defendant, and cited; he having formally excepted to the jurisdiction of the court *ratione personæ*, and his exception having been overruled, and no bill of exceptions reserved; final judgment having been rendered against him on default, and no appeal having been taken therefrom—it seems to us quite unreason-

able that the debtor should entertain apprehension about the pending suit in the United States Circuit Court; for, most assuredly, a copy of this opinion and decree would be competent evidence therein.

Our Code of Practice provides "that the same cause can not be brought before two separate courts, though they be possessed of concurrent jurisdiction; the judge before whom the action was brought first, shall sustain his jurisdiction, and the defendant shall be entitled to have the case dismissed by the other court, and recover costs.

Nevertheless, if the defendant, instead of claiming to be dismissed, answer in the two actions, in the two separate courts, the *first judgment* rendered by *either* of them shall be valid and executory against the party cast in the action. All proceedings shall be staid in the *other* court, and the plaintiff dismissed after paying the costs." Art. 94. Succession of Townsend, 37 An. 409.

On the question of *litis pendens*, the Federal jurisprudence is the same as our own.

In Stanton vs. Embry, 93 U. S. 554, the Supreme Court held that the pendency of a *prior* suit in another jurisdiction is no bar to a *subsequent* suit in a Circuit Court, even though the two suits are for the same cause of action and between the same parties. Gordon vs. Gilfoil, 99 U. S. 169.

But the debtor Jacobs did not urge the plea of *lis pendens* in either suit and the State court rendered the first judgment, and it is valid and executory, and by it he may be protected in the United States Circuit Court.

This argument and these deductions are just as true and as strictly applicable to the complaint of the purchaser, Mrs. Jacobs, who is also an appellant in her personal capacity and occupies the relation of a third person to the judgment appealed from, and appears by petition and citation of appeal. The record shows that the property was adjudicated to her at $25,000 during the pendency of the executory proceedings, and with full knowledge of the contents and purport of the certificate of mortgages which is annexed. How she can entertain any hope of relief we can not conceive. If her appeal is to serve *any* purpose whatever it would appear to be rather to *increase* than to *lessen* the burdens affecting the property purchased, as she has no interest in the disbursement of the purchase price among the parties before the court.

Her complaint of the writ of citation is equally without force. So far as the funds to be distributed are concerned she is but a stockholder, and stands in the room and stead of the sheriff who made the sale under an order of the court, and who was directed and required "to retain in his hands, subject to the further order of the court, and out of the proceeds of sale * * to pay the sum of $8000, with 8 per cent. per annum interest from March 7, 1882, and 5 per cent. attorney's fees, and costs."

The sheriff accepted service and waived citation. At the sale Mrs. Jacobs became the adjudicatee, and for the mutual convenience and security of all parties in interest the following agreement was made:

"PARISH OF ST. JAMES, March 17, 1888.

"Be it known that, on this 17th day of March, 1888, it has been agreed and understood by and between the purchaser of the property, Mrs. Ellen Marson, wife of Octave Jacobs, and Mrs. Julia Kunemann, that in consideration of the purchaser of the plantation this day sold in the matter of Amant Bourgeois vs. Octave Jacobs, No. 1323 of the docket of the Honorable the Twenty-second Judicial District Court for the parish of St. James, which plantation is fully described in the said proceedings, retaining in her hands the amount of the third opposition claimed herein, said amount to carry interest stipulated in said note from this day, the said purchaser *binds herself to pay the amount of the judgment to be rendered on such third opposition.*

(Signed) "SIMS & POCHE,

"*Attorneys for Mrs. Octave Jacobs.*

"CHAS. LOUQUE,

"*Attorney for Mrs. Kunemann.*"

She has since retained the money in her hands, and has it now. This paper furnishes the proof of this fact. She occupies just the same position as the sheriff did, and is just as amenable as he is or was "to the further order of the court." This agreement contains what, to our thinking, is the equivalent of a confession of judgment. Certainly no further or additional citation was contemplated by the parties. The judge of the vicinage had all the parties before him, and was familiar with the parties and all of the incidents of the trial,

and as he seems to have entertained an equitable view of the matter in hand we find no occasion to reverse his finding.

Judgment affirmed.

The Chief Justice and Mr. Justice Breaux, not having been present when this case was submitted, take no part.

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No. 11,331.

THE STATE EX REL. JEAN LAMOURAINE VS. JUDGE OF DIVISION "B," CIVIL DISTRICT COURT FOR THE PARISH OF ORLEANS.

In the exercise of the supervisory jurisdiction of the Supreme Court over inferior tribunals, we will not, when a judge has voted correctly, although the proceedings were irregular, but no injury done to the party, remand the case for him to make precisely the same ruling in the regular course of procedure.

In summary process to obtain possession of leased premises the defendant must comply with Sec. 2157, in order to obtain a suspensive appeal.

Where the cause of action is not within the jurisdiction granted by law to the tribunal, it can dismiss the suit at any time it is brought to its notice.

APPLICATION for Certiorari, Mandamus and Prohibition.

John C. & Chas. A. Wickliffe for the Relator.

Chas. J. Théard and *A. N. Fleming* for the Respondent.

The opinion of the court was delivered by

MCENERY, J. This is an application for writs of mandamus and prohibition against the respondent judge.

The relator was defendant in a suit instituted against him in the Second City Court of New Orleans for the purpose of ejecting him from leased premises. The suit was tried and judgment rendered against him in pursuance of Secs. 2155, 2156, 2157, Revised Statutes.

The defendant applied for a suspensive appeal, and tendered the bond. The appeal was denied.

He applied for the necessary writs to the Civil District Court, parish of Orleans, to enforce his right of appeal. One of the judges of said court issued an order as follows:

"Let the petition be filed and let the writs of certiorari, mandamus and prohibition issue as prayed for."

On the allotment of cases this application went to the judge of Division "B" of said court. The judge of Division "B" set aside the order for the writs mentioned, and made the usual order in such cases, commanding the judge of the Second City Court to produce the record in the suit for the ejectment of defendant, and to show cause why the writs originally prayed for by defendant should not be granted.

The judgees of said city court produced the record with his answer.

The trial of the rule was fixed for the 11th September, 1898. The judge on an inspection of the record became satisfied that the Civil District Court was without jurisdiction to grant the order for a suspensive appeal, and denied the relief prayed for and discharged the rule. In his answer the respondent judge says that although not personally present the relator and his attorney had full notice and knowledge that their application for said writs would be heard on the day and hour named for the trial of said rule. The relator filed a motion for a new trial, which was heard and overruled.

In the application for the writs to this court the relator avers that more than $25 were in dispute in the ejectment suit, and that he was entitled to an appeal from the judgment rendered against him.

He complains of the order of the respondent judge in setting aside the order granted by one of the judges of the Civil District Court before the allotment of said case, and of the setting of the rule to show cause for trial without giving the relator due notice of the same.

The order granted in the first instance did not mention any day when the rule asked for by relator should be tried. It ordered that the writs prayed for should issue. Had the case been allotted to said judge, he would undoubtedly have had the power to so alter the order as to require the respondent to answer on a day certain why the writs should not be made peremptory. The judge of Division "B" did that which the judge who granted the order could have done. The rights of relator were not in any way affected. His petition for the writs was still pending and on file, and although the first order was set aside, yet it was only for the purpose of granting the order as prayed for by relator. The respondent judge fixed the trial of the rule for a certain day. Plaintiff and his attorney were absent, and although not formally served with notice they knew of the day fixed for the trial. But whether this was sufficient notice or not, the entire record was

before the judge, and the following facts were before him. None other could have been urged by the relator, as these were shown by the record and were conclusive.

The plaintiff sued for the possession of leased premises. The defendant filed a motion to set aside the order fixing the case for trial. He filed an exception to the jurisdiction of the court, on the sole ground that the "demand of plaintiff fails to show any jurisdiction of this court." He filed an exception that the full name of the plaintiff had not been disclosed. These exceptions being overruled, he filed an answer as follows: "Now comes defendant and for answer shows that plaintiff has accepted rent for the premises since the commencement of these proceedings, and is therefore not entitled to prosecute this action. He further makes general denial of plaintiff's claim. He shows that under his contract with plaintiff he is entitled to still hold the premises in dispute."

There was judgment for plaintiff, and the defendant filed a motion for a new trial. After the rendition of the judgment the defendant made an affidavit and filed the same, stating that the amount in dispute was over $25. He then applied for a suspensive appeal and tendered his bond. The face of the record shows conclusively that the Civil District Court was without jurisdiction to arrest the judgment by ordering a suspensive appeal. There was no special defence supported by oath of defendant that all the facts contained in the answer were true and entitle him to retain possession of the leased premises, so as to suspend execution of the judgment pending the appeal. The arrest of the judgment could not therefore be ordered by the District Court. This judgment must be executed in accordance with the provisions of the Revised Statutes under the chapter of Landlord and Tenant. But we do not understand the summary process for the ejectment of tenants prevents a devolutive appeal from the judgment where the amount in dispute vests the appellate court with jurisdiction.

The rent was for $30 per month, and the relator alleges in answer that the lease had been continued for another month and that he was entitled under his contract to remain in possession for the unexpired term. But no application was made for a devolutive appeal.

The respondent judge found on his docket an application for writs to compel a suspensive appeal to his court of a case of which he had no jurisdiction. The face of the papers showed that the order had

been improvidently granted. He would have had in the first instance the power to refuse to order the issue of the alternative writs. He had a right therefore *ex proprio motu* to dismiss the case for want of jurisdiction at any time it was brought to his notice. 22 Barb. 271; 23 Conn. 172; 2 Ohio, 26; 13 Vt. 175; 4 Ill. 133; 38 An. 704; 41 An. 540.

If the relief prayed for by relator were granted, the result could only be a repetition of the decree rendered by the respondent judge.

Conceding that there was irregularity in the proceedings below in disposing of a case of which he had no jurisdiction to arrest the judgment and grant the relief prayed for, we can not compel him to assume jurisdiction where he has none; nor will we so exercise the supervisory jurisdiction of this court over inferior tribunals so as to compel them to withhold their signatures from a judgment that is correct in eliminating from their dockets cases which have been improperly lodged there. State ex rel. Suberville, 45 An. (just decided).

The relief prayed for is denied and the rule granted herein discharged at relator's costs.

Rehearing refused.

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No. 11,314.

THE STATE EX REL. LOUIS SUBERVILLE VS. JUDGES OF THE COURT OF APPEALS.

The Court of Appeals has no jurisdiction of a demand for alimony, as it is an accessory to the principal demand in a suit for divorce or separation from bed and board, of which it has no jurisdiction. Arts. 81, 95, Const.

An inferior court having an application in aid of its appellate jurisdiction for writs of *mandamus* and *prohibition* passed upon its jurisdiction, correctly, this court will not do a vain and idle act, in compelling said court by the exercise of its supervisory jurisdiction to pass a second time on said question of jurisdiction.

APPLICATION for Writs of Certiorari and Mandamus.

J. N. Wolfson and *A. L. Tissot* for the Relator.

Respondents *in propriis personis.*

The opinion of the court was delivered by

McEnery, J. The relator alleges that in the suit of Louis Suberville vs. Lorenza Adams, Civil District Court, Parish of Orleans, for divorce, a rule was taken on behalf of defendant, which was made final, ordering plaintiff to pay the defendant wife $60 per month alimony, with interest, on monthly payments; that the rule was defective in not assigning a domicil for the defendant *pendente lite*, and that she had occupied said domicil since said assignment, and that she was in need of the necessaries of life; that in consequence of the defects in the allegations of the application for the rule as above stated, the judgment thereon was a nullity. That previous to the expiration of the delay for an appeal an execution issued on said judgment and plaintiff's property was seized to satisfy the same. That within the period allowed for an appeal relator applied for and obtained an order of appeal from said judgment, returnable to the Court of Appeals for the parish of Orleans, which was perfected by relator, thus divesting the District Court of jurisdiction and giving jurisdiction to the Court of Appeals.

That after giving the appeal bond and divesting the jurisdiction of the said District Court the defendant took a rule on plaintiff, the relator, to show cause why said order of appeal should not be set aside and execution on the judgment for alimony issue, on the ground that the Court of Appeals was without jurisdiction.

Relator excepted to the rule on the ground that the District Court was without jurisdiction, having divested itself of the same by granting the order of appeal, and that the Court of Appeals, to which an appeal had been taken, was alone vested with the power to determine and pass upon the jurisdiction in said suit.

The rule was made absolute, and an *alias* execution issued and the property of plaintiff again seized. An application for an order of appeal from this judgment was made by plaintiff and overruled. After these several proceedings the relator applied to the Court of Appeals for the parish of Orleans for writs of mandamus and prohibition, directed to the judge of the Civil District Court, to compel the district judge to grant appeals from both judgments on the rules to show cause why alimony should not be allowed defendant, and the judgment setting aside the order of appeal from the judgment on the first rule. The alternative writs issued as prayed for, and on trial of the rule it was discharged and the relief prayed for denied, on the ground that the court had no jurisdiction of the matter in dispute.

The relator now invokes the supervisory jurisdiction of this court to compel the district judge to grant the orders of appeal prayed for, and the Court of Appeals to take jurisdiction.

From the above statement of facts it appears that the relator appealed from the judgment allowing alimony to the defendant wife to a court having no jurisdiction of the principal demand, the suit for divorce.

The demand for alimony grows out of the suit for divorce and is inseparable from it. It is an incident to the principal suit, an accessory to it. It is granted pending the divorce suit, and is not dependent upon the judgment in the case. DeLesdernier vs. Husband, 45 An. —.

The Supreme Court is the only one having appellate jurisdiction of suits for divorce and of separation from bed and board. Article 81 of the Constitution.

But the relator contends that the Court of Appeals, after the order of appeal had been granted, was vested with jurisdiction and that it alone had the power to determine it in the case pending on its docket, and it was error for the judge to set aside the order of appeal from the judgment allowing alimony to the defendant, as the District Court in that decree passed upon the jurisdiction of the Court of Appeals.

The Court of Appeals in the trial of the rule sued out by plaintiff and relator for mandamus and prohibition passed upon this question, and this was all that could be expected if the case had been docketed and the jurisdiction of the court in the matter passed upon. The issue was presented by relator in the application for the writs and the Court of Appeals necessarily had to pass upon its jurisdiction over the case.

We are not called upon to pass upon the ruling of the district judge, as these matters were before the Court of Appeals in matters affecting its appellate jurisdiction under Art. 104 of the Constitution.

The Court of Appeals has already passed upon and decided that it has no jurisdiction of the appeal from the judgment allowing alimony.

As this judgment is correct we can not therefore compel it to assume jurisdiction when it has none.

To compel the court to consider the appeal because it was sent to that court, and to pass upon the question of jurisdiction in its order on the docket, would be doing a vain thing, as it has already, in the judgment in the rules invoked by plaintiff, determined this question.

The relief prayed for is therefore denied, and the rule granted herein discharged.

No. 11,317.

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THE STATE EX REL. WILLIAM H. STUART VS. FRANCIS A. MONROE, JUDGE, ET ALS.

The remedy is by appeal, and not by writs of certiorari and prohibition.

If the plaintiff does not choose to furnish a bond of release, after ten days have elapsed, subsequent to the sequestration of the property, the defendant is not precluded from the right to bond.

The right to bond property sequestered is not suspended by a suspensive appeal from a judgment in which that right is not involved.

APPLICATION for Writs of Certiorari and Prohibition.

Girault Farrar, *Henry J. Delesdernier*, *Joseph Brewer* and *Horace L. Dufour* for the Relators.

Carroll & Carroll for the Respondents:

Relators' petition is fatally defective in that it does not allege that a plea was filed to the jurisdiction of the court below and that the plea was overruled. 29 An. 806; 37 An. 845; 38 An. 596; 38 An. 920; 40 An. 607.

Even if the allegations as to jurisdiction be sufficient, relators affirmatively show that, on the rule to bond, they raised other defences without reserving the benefit of any plea or objection to the jurisdiction. Such pleading waives the plea to the jurisdiction even if it had been filed. 10 L. 228; 18 An. 339; 30 An. 596; 32 An. 1148; 41 An. 141.

As a matter of fact, relators have full and adequate remedy by appeal. 5 N. S. 42; 26 An. 65; 35 An. 515.

Certiorari and prohibition do not lie when there is remedy by way of appeal. 6 N. S. 382; 11 An. 698; 32 An. 1132; 32 An. 1092; 33 An. 923; Louque, p. 593, No. 21.

The judgment allowing Sutcliffe to bond in no manner interferes with the pending appeal from the judgment on the merits previously rendered. The Civil District Court is the only court to which Sutcliffe could have made application, as any such action on his part in the Supreme Court would have brought the matter for the first time before that tribunal, making it a court of original instead of appellate jurisdiction. The Civil District Court was seized of jurisdiction, and the writs lie only when the court below has no jurisdiction. C. P. 845, *et seq.*

The authorities cited by counsel do not sustain the doctrines for which they contend. These authorities are discussed in detail.

As to the civil sheriff, the writs can not issue against him unless he be a "necessary adjunct to the proceedings against the judge." 34 An. 653; 33 An. 794. Inasmuch as the proceedings against the judge are not well taken, those against the sheriff must fall.

This brief contains no discussion of the points raised in relators' petition and brief as to the respective rights of the parties to bond the sequestration, or the loss of Sutcliffe's right by not acting within ten days, or the terms of the judgment allowing him to bond. The Civil District Court having jurisdiction in the

premises, the action of that court can not be reviewed in proceedings of this character. This court will not in such proceedings examine into the details or correctness of the judgment rendered below, otherwise its supervisory powers would be confounded with its appellate jurisdiction. 35 An. 655; 38 An. 377; 38 An. 921.

The opinion of the court was delivered by

BREAUX, J. The testamentary executors and forced heirs of the late William Stewart are plaintiffs in a case against William W. Sutcliffe et al., in which they sued for and obtained a sequestration of a certain policy of insurance, No. 960, issued by the Mutual Life Insurance Company of New York.

The case was tried and a final judgment was rendered by the respondent judge, which was signed on the 9th day of March, 1893, awarding to the defendants, Sutcliffe et al., the sum of $5000, with interest at 6 per cent. thereon, from the proceeds of the sequestered policy.

On the 17th day of March, 1893, the plaintiffs in that case took a suspensive appeal to this court, which is now pending for decision.

On the 20th of June, 1893, the defendant Sutcliffe applied to bond the property sequestered, to which the defendant in rule objected on the grounds that a suspensive appeal in effect limits the jurisdiction of the court *a qua* to tests of the solvency of the surety, or to the sufficiency of the appeal bond; that an order to bond sequestered property, after final judgment has been rendered and a suspensive appeal therefrom perfected, is *ultra* the authority of the court *a qua;* that the defendant has only ten days within which he may exercise the right to bond; that the article of the code defining the conditions of the forthcoming bond preclude the idea that sequestered property having been converted into money the money can be bonded.

After a legal hearing the court issued an order authorizing the plaintiff to furnish a forthcoming bond in the sum of $5750.

The defendant Sutcliffe, after due notice, applied to this court for writs of certiorari and prohibition.

REMEDY BY APPEAL.

The relator did not exhaust his remedy before applying for these writs.

He had a right of appeal, which he did not choose to exercise.

DeBaillon vs. Ponsony, 5 N. S. 42; State ex rel. Taylor vs. Judge, 26 An. 65; State ex rel. Sweet vs. Judge, 35 An. 515; State ex rel. Roth vs. Judge, 37 An. 846.

The relator is therefore without right to the writ. State ex rel. Chamber vs. Kruttschnitt, Judge *ad hoc*, 44 An. 567; State ex rel. Street vs. Rightor, Judge, 35 An. 515; State ex rel. Weber et al. vs. Skinner, Judge, 32 An. 1092; State ex rel. Monroe, 33 An. 923; State ex rel. Hernandez vs. Monroe, 33 An. 928.

DEFENDANT'S RIGHT TO BOND.

Moreover, waiving this view of the case and conceding that the issues are before us on appeal, the result is the same.

The plaintiff not having availed himself of the right to bond the property after ten days subsequent to the sequestration had elapsed, the defendant was not absolutely precluded from all right to furnish a forthcoming bond.

The law authorizes the plaintiff to bond if defendant fails to bond the property within ten days.

It does not exclude the defendant from bonding when the plaintiff does not choose to exercise the right after the ten days have elapsed.

JURISDICTION.

A suspensive appeal from a final judgment and the filing of the appeal bond exhausts the jurisdiction of the court in all matters appertaining to the appeal, save questions relating to the sufficiency and solvency of the appeal bond.

The effect of the appeal, however, does not divest the court of jurisdiction to issue an order authorizing a forthcoming bond, and thereby restore the property to commerce and to use.

This court has no authority to issue such an order; only the court of original jurisdiction has the authority to issue such an order.

The right to bond would be in abeyance during the appeal if the court *a qua* had no jurisdiction.

There would be a contradiction in terms.

In one case the right to bond is declared to exist throughout the trial.

In the other it would be held in suspense on appeal.

The law granting the right to furnish a forthcoming bond does not lay down any such limitations.

The rules regarding jurisdiction apply generally to the conservatory writs.

In case of the State ex rel. Leon Gerson vs. Richardson, Judge, 37 An. 261 (a case in which a writ of attachment was issued), the court held that it was possible to exercise the right to bond "in every stage of the suit," and no exception is suggested because of an appeal.

In that case it was also decided that the proceeds of the property takes its place and is subject to the right to bond.

The relator directs our attention to the following cases: Smelser vs. Blanchard, 15 An. 254; State ex rel. Graham, Auditor, vs. Judge, 24 An. 598; State ex rel. Dubuclet vs. Judge, 24 An. 600; State ex rel. Mahan vs. Judge, 25 An. 666; State ex rel. Gourgotte vs. Porter, 27 An. 431.

In the first case a suspensive appeal was taken from an order on a rule against the executrix to sell property for the payment of debts.

Nevertheless, pending the appeal, the clerk issued a commission to sell.

The sale of the property was an issue on appeal, which appeal superseded the power of the District Court to sell. The question involved was not remote from the issues, but one of the issues presented on appeal. In the second case it was announced that when an appeal has once been taken, the consent of the parties is ineffectual to dismiss it without the action of the court.

In the third case, that of Dubuclet relator, the court held that after an appeal had been granted, the court *a qua* is without jurisdiction to pass upon the question whether the appeal is a nullity. Only the appellate court could pass upon the validity of the appeal.

In the fourth case, Mahan relator, the lower court assumed to sell property, the sale of which had been enjoined. The property was actually under a seizure the illegality of which was urged on appeal.

In the last case to which our attention is invited, 27 An. 431, the relator had furnished a release bond.

Without notice to him, the court *a qua* declared the bond not solvent and the plaintiff was permitted to bond the property.

From the last order ousting him from his possession the relator appealed.

Notwithstanding the appeal the plaintiff and appellee persisted in taking and withholding the property.

The right of the parties to bond was the issue of the case, and while pending on appeal it was ordered that the possession of the property should remain with the party who had furnished the first release bond. He was appellant.

The sum and substance of all these decisions referred to in support of relators' application is that an inferior court has no authority over any of the issues pending on appeal.

In the case at bar there is no possibility of interference by accepting a bond of release; that right—that is, the right of bonding—is not at all involved on appeal in the case at bar.

Whether the property is bonded or not bonded is of no consequence in passing upon the questions on appeal.

Neither party can thereby gain an advantage in the determination of the issues.

For reasons assigned, the provisional orders heretofore granted are rescinded and the writs asked for refused at relators' costs.

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No. 11,870.

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THE STATE OF LOUISIANA VS. THOMAS CARTER.

In a prosecution for murder, the defendant will not be allowed to show the dangerous character of the deceased or threats by him unless a hostile demonstration by the deceased has first been proven.

APPEAL from the Twelfth District Court, Parish of Calcasieu. *Fournet, J.*

E. D. Miller, District Attorney, for the State, Appellee.

Wesley G. McDonald for Defendant and Appellant.

The opinion of the court was delivered by

PARLANGE, J. The defendant was indicted for the murder of one John Williams. He was tried by a jury and found guilty without capital punishment. He has been sentenced to imprisonment for life in the State penitentiary and he has appealed.

The facts of this case, as shown by the bills of exception, are as follows:

The defendant and John Williams had an altercation, during which the defendant said that if Williams did not pay him 25 cents he would knock Williams' head off. They then played at dice until the defendant had lost his stake. Defendant then went to a house, one hundred yards distant, to procure a Winchester rifle. He stated to a woman who was in the house that he wanted the rifle to kill a hawk. The defendant returned with the rifle to the place where Williams was, some thirty or forty minutes having elapsed since the defendant had left Williams, and when the defendant came within twenty feet of Williams he shot the latter in the back, killing him without warning, and while the latter was on his knees playing at dice. The judge *a quo* certifies that there was no hostile demonstration by Williams against the defendant and that while Williams did hold an axe during the time of the altercation first mentioned he made no attempt to strike with it. The finding of the judge *a quo* on this point is not open to review by us in this case.

The defendant complains that he was not permitted to offer evidence to show that Williams had made threats against his life. He further complains that he was not allowed to show the dangerous character of the deceased; and that the deceased had murdered a man in Alabama and another in Slidell, La., and was a fugitive from justice. This evidence was offered by the defendant in mitigation of the offence.

Under the settled jurisprudence of this State, a defendant in a prosecution for murder will not be allowed to offer proof as to the dangerous character of the person whom he is charged with having murdered, unless a hostile demonstration by the deceased against the defendant is first proven. The same rule applies to threats. Nor in this case was the offered testimony admissible for the purpose of mitigating the offence. In State vs. Robertson, 30 An. 340, this court held that in a trial for murder, evidence as to the dangerous character of the deceased can not be admitted even in mitigation, unless the defendant first shows that he was attacked by the deceased and was aware of the latter's character.

The instant case does not contain a single element of self-defence, nor any fact upon which defendant could in law claim a mitigation of the offence charged. He has escaped the extreme penalty of the law. No injury has resulted to him in law from the exclusion of the proffered testimony and without injury shown, this court will not disturb the verdicts of juries in criminal cases.

The defendant further complains that after he had shown by a witness that defendant's general reputation for peace and good order was good, he was not allowed to elicit from the witness an answer to the following question: "What was the disposition of the defendant; was it that of a man who would seek a difficulty or that of a man who would avoid a difficulty?" The counsel for the State raised the objection that the question was leading and that by it the opinion of the witness was sought to be elicited; the objection was sustained by the court.

Strictly speaking, the question was leading. State vs. Johnson, 29 An. 717. The defendant's counsel might have framed his question in an unobjectionable form. The witness had already testified that the defendant's general reputation was good for peace and good order, and the defendant had the full benefit of that testimony. Under the facts of this case, we do not consider that the defendant was injured by the refusal of the trial judge to allow the question to be answered.

Defendant's last complaint is that while he was on the witness stand testifying in his own behalf, he was not allowed to answer the question: "Why he had killed the deceased," propounded to him by his own counsel.

The trial judge states that the defendant had just testified at length how and under what circumstances he had killed the deceased and that "the question was an attempt to admit evidence of previous threats, when no hostile overt act had been shown on the part of the deceased against the defendant at the time of the killing."

Defendant's counsel urges in his brief that the trial judge could not know, in advance of the answer, what the object of the question was. But the counsel does not state what his object was, nor do we understand him as denying that the trial judge was correct in ascribing, as the motive for the question, a purpose to introduce proof of previous threats, which proof the trial judge had already excluded. If the trial judge was in error regarding the purpose of the question, defendant's counsel should have stated what the true purpose was, and if that purpose had proven to be lawful we are to presume that the trial judge would have allowed the question to be propounded and answered. Under the facts and circumstances of this case, we can not surmise what other purpose defendant's counsel could have had, than to elicit statements as to previous threats by Williams and

as to the character of Williams. The conclusion is almost irresistible, when we consider that the defendant's counsel did not disclose his purpose at the trial and that he is still silent in this court as to that purpose. If the object was to elicit the testimony which the trial judge had already ruled out, the question was evidently improper.

If the purpose was to show the motive, although no such claim is made, it seems clear that the defendant intended to testify that he was moved to do the killing by threats of Williams and by knowledge of Williams' character. Such testimony was inadmissible under the ruling of the trial judge and the facts and circumstances of this case, as coming from witnesses other than the defendant; it was equally inadmissible as coming from the defendant himself. In this regard, he was on the same footing as any other witness. But it is not for this court to conjecture as to the purpose for which the question was asked. It was for the defendant to show the purpose and that he suffered injury by the exclusion. He has done neither.

We find no error entitling the defendant to a reversal of the judgment.

Judgment affirmed.

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No. 11,325.

Dr. Henry De Mahy vs. Morgan's Louisiana & Texas Railroad and Steamship Company.

The locomotive of a stationary train at Cade, one of the stations of the defendant company, having been detached, returned shortly after with freight cars, which the employés of the company coupled to those which had been left standing on a side track. The coupling caused a considerable jolt and moving of the cars, which, under ordinary circumstances, would not have been dangerous to grown persons standing upon the platform of the passenger coach. On the particular occasion a child of 2 years and 11 months was standing upon the platform. The jar caused it to be thrown down and to fall between the opening between two cars. The mother, a passenger, who was inside the coach, ran out, jumped to the ground, and thrusting her arm under the car saved the child, but in so doing her own arm was caught under one of the wheels and badly broken. The present suit is for damages for her injuries. The action is grounded upon the charge that the defendant was guilty of gross and wanton negligence in not having built a station house at Cade station, and upon a charge of negligence on the part of the officers and employés of the company in not having notified the passengers of the approach of the coupling cars. The conductor had, in a

tone loud enough to be heard, told passengers to keep their seats, but he had not specially warned them not to go upon the platform, nor did he give them notice that the cars were about to be coupled.

Held—That the failure of the company to build a station house was a fact too remote to furnish a ground of action in this case. It was not the proximate cause of the accident; that the accident was due solely to the fact that a child of such tender years was standing where she should not have been, upon the platform of the coach; that but for such exceptional facts, which the conductor could not reasonably be expected to have anticipated, neither the coupling of the cars nor a position on the platform would have been attended with danger; that the coupling was such as is habitually made at Cade station whilst waiting the arrival of the train on the main road; that the employés were at their respective posts for such work, and that the concussion from the coupling was not greater than was usual, nor unreasonably violent; that however deplorable the accident the defendant can not be legally held responsible for it under the circumstances.

2. The declaration of the person injured, made at the moment of the accident, that she alone was to blame for it, should have been permitted to have been proved as part of the *res gestæ*.

APPEAL from the Nineteenth District Court, Parish of St. Martin. *Voorhies, J.*

C. H. Mouton and *C. DeBaillon* for Plaintiff and Appellee.

D. Caffery & Son and *Jas. E. Mouton* for Defendant and Appellant:

1. In an action against a common carrier for personal injuries received in an accident charged to have been the result of defendant's negligence, the burden of proof is upon the plaintiff to show the negligence of the defendant, and the want of contributory negligence in himself. 40 An. 786; 31 An. 49; 30 An. 15; Rorer on Railroads, 531; 30 Md. 47; 46 Barbour, 529.
2. In such actions the decisions of the Federal courts and of the courts of the several States are good authority.
3. A contract of carriage entered into by an individual with a common carrier terminates upon the delivery of the passenger at his destination.
4. A sufficient time having elapsed for a passenger delivered at his destination to leave the railway premises, the contractual relations are entirely at an end and the passenger is a stranger to the railroad. A. & E. Ency. of Law, p. 744, No. 10.
5. A railroad owes no duty of providing a waiting room for strangers.
6. Even where the contractual relations are yet existing and a passenger injured while occupying a coach as a waiting room complains that had the railroad provided a regular waiting room he would have been therein and so escaped injury, the cause alleged is too remote to admit of a recovery. Royston vs. Illinois Central R. R. Co., Southern Reporter, p. 320.
7. It is not a legal duty on the part of railway companies to establish passenger depots at every station on their roads, unless the freight and passenger traffic at said stations is important enough to require it.
8. The law only requires safe and comfortable appliances and reasonable accom-

modations to be furnished for the traveling public at stations important enough to require it.

9. Where a parent sues for injuries to himself or herself from an accident to his or her child, in which accident the parent also suffers injury, no recovery can be had by the parent when it is shown that the parent's negligence was the proximate cause of the accident, although defendant may likewise have been in fault or been negligent.
10. Where plaintiff's wife permitted her child to stay upon the platform of a car, and the child was thrown from the platform, and the mother was injured in attempting to rescue it, the plaintiff can not recover for the injuries of the wife because of the contributory negligence of the wife in permitting the child to run upon the platform. Southern Reporter, p. 872; 21 Atlantic Reporter, p. 878.
11. The declarations of the plaintiff and his wife concerning the accident, exonerating defendant from fault, are strong evidence against them. Olivier vs. R. R. Co., 43 An. 804.
12. Unless the circumstances of the case show malice, wantonness, oppression or violence on the part of defendant, punitive or exemplary damages are not recoverable.

The opinion of the court was delivered by

NICHOLLS, C. J. Dr. Henry De Mahy, "suing for himself and for his wife, Cecilia De Mahy, and also in his capacity as father of his minor child, Tullia De Mahy, and for the separate use, benefit and advantage of his said minor child," represents in the petition which he filed in this case that on or about the 3d of June, 1892, petitioner's wife with her child Tullia, a little girl then aged two years and eleven months, at St. Martinsville, in the parish of St. Martin, took passage on, and with the said child got on the regular passenger train of the branch railroad of the Morgan Louisiana & Texas Railroad and Steamship Company, running to Cade, a regular station on the main road or track of said company in the parish of St. Martin; that the fare from St. Martinsville to said station at Cade was paid. That the motive, or purpose, or business the said Mrs. De Mahy had to take passage on said train of said branch road and go to said Cade station was to meet and receive there her sister, whom she expected, knowing that she was coming from New Orleans on that day on the regular passenger train of said railroad company to Cade station, there to take the train of the aforesaid branch road of said company and come back with her to St. Martinsville, where the said sister was coming on a visit to petitioner's family. That the defendant is a corporation created by the General Assembly of the State of Louisiana, and that the branch road from St. Martinsville to the station at Cade, where it makes connection with the main line or

track of the railroad of said company, belongs also to said company, and was then and is still under its control, and was then and is now run and managed by employés and officers in the service of the defendant company, and that the said company is liable and responsible for all damages resulting or growing out of any act of negligence, mismanagement of said officers and employés or any one of them, just as much so as if said damages would result or grow out of any omission on the part of said company to do or perform any thing or act deemed necessary in law for the protection of the life and person of its passengers, and of those having business with it.

That on said 3d day of June, 1892, the said train from St. Martinsville arrived at Cade station more than one hour before the train coming from New Orleans reached said station; that on the train and in the same coach or car in which petitioner's wife and child were, there were also several ladies and several young children; that usually the train of said branch road running from St. Martinsville to Cade station, which is a mixed passenger and freight train, arrives there one hour before either the passenger train coming from New Orleans and going west or the train coming from Texas and going east gets at Cade station; that consequently passengers who come from St. Martinsville to said station to take one or the other of said trains or to meet and receive expected friends at said station have to wait there during a considerable time, sometimes more than one hour, and that in the meantime said passengers are told and permitted to remain in the car or coach in which they have come, for the reason that said company has grossly and wantonly neglected to build a station house and waiting room for the accommodation of the passengers and other persons while waiting at said station the arrival of expected trains. That although it has been several years since the defendant company has established a regular station at Cade on the main line or track of the said road, where the train of their branch road, coming from said St. Martinsville, has been making connection with its main line, bringing passengers there daily, said company has grossly and wantonly neglected to build a station house or waiting room for the accommodation and safety of its lady and children passengers who have to be detained at said station awaiting the arrival of expected trains.

That on the said 3d day of June, the car or coach in which petitioner's wife and child and the other ladies and children were, when

it reached Cade station was placed on a side track or switch alongside the main track or line of said railroad and was left there to await the arrival of the passenger train coming from New Orleans and going west; that to this car or coach there was a baggage, express or smoking car attached and coupled; that after having placed the car or coach in which petitioner's wife and child were, and the one attached and coupled to it, both were left on said side track and the locomotive was detached from said cars and taken on the main line or track, switching during a considerable time displacing and replacing freight cars; that having been thus left in said car or coach on said side track or switch, petitioner's wife, as well as all the other ladies in the said cars, felt in a state of perfect security and safety, as much as if they had been standing in their own house; that after having been in said coach on said side track nearly one hour the children became more or less restless and commenced moving about, and petitioner's wife, tired of remaining sitting so long, got up, and whilst standing and watching her said child, all at once the locomotive, without having been seen by petitioner's wife and the other ladies on the said coach, got off the main track where it had been switching and was brought from behind on the said side track or switch, shoving before it two freight cars, and that in coupling said freight cars to the baggage, or express, or smoking cars to which the coach in which petitioner's wife and child were, struck it with great force and violence, thereby shoving and pushing it with equal force and violence against the coach or car in which petitioner's wife and child were, thereby producing and causing a violent and sudden jolt and concussion by which petitioner's little girl Tullia, who was then standing very near to her mother, was thrown off the said coach or car; that there was neither notice or warning given of any kind of the approach of said locomotive with said freight cars on said side track or switch for the purpose of coupling as aforesaid, and that at and about that moment there was no officer or employé of said company in or about the coach in which petitioner's wife and child were; that when petitioner's child was thrown off said car or coach in the manner above stated, she fell between the coach or car in which she was and the express, or baggage, or smoking car thereto attached and under the latter, and that seeing her child thus precipitated under a moving car or train the mother, frantic with fear and grief at the sight of the imminent danger to which her child was

exposed and moved by that motherly love which is stronger than the feeling or sentiment of self-preservation, she spontaneously sprang from the coach where she was to the assistance of her child, whom she found under the moving car or train with its head lying on or across the rail and about to be crushed by the wheels of said car, and that upon seeing which she ran her right hand and arm under said car and shoved the child further under, thereby saving the life of her child, but as the train did not stop and kept moving along her said arm was caught under the wheels and the flesh was lacerated, the bone was broken and crushed into pieces, causing most excruciating pains and suffering; that the said child Tullia was then and there badly hurt, that she received on her right arm several very painful wounds which have left large cicatrices or scars and which have caused the bone of the forearm to be bent and disfigured; that said injuries and wounds have caused great pain and suffering to said child, for which the defendant corporation is responsible to her.

That ever since said occurrence petitioner's wife has been confined to her bed, suffering from her wounds and bruises, needing constant medical assistance and nursing; that the injury to her right arm is permanent, and that she will never again be able to use it to do and perform any household duties, and not even to render to her young children those services which a mother owes them; that besides the injuries she has received as aforesaid on her body, and the great physical pains she suffered in consequence of the same, she has undergone and endured horrible and dreadful mental pains and sufferings, such as no one but a mother can feel, when she saw her said child precipitated and thrown from the coach under a moving train, with its head lying on or across the rails, exposed at a second to be crushed to death. Petitioner further represented and charged that the personal injuries to his wife and child as aforesaid, as well as the physical pains resulting therefrom, and the mental pains and sufferings undergone and endured by his wife, have been caused principally by the culpable, gross and wanton neglect of the defendant not to have built at their station at Cade a station house or waiting room for the reception and accommodation of its passengers and other persons having business with it, and who have to wait there a considerable time for the arrival of the expected train; and also by the negligence of the officers and the emyloyés of said com-

pany then in charge of said train to not have given proper and timely notice and warning to the persons left in the coach on the side track or switch of the coming and approach of the locomotive with its freight train for the purpose of coupling, as stated and set forth.

That his wife is about 30 years old; that in consequence of the personal actual injuries she has received as aforesaid she has ever since been most of her time confined to her bed, unable to do and perform work of any kind, or even to superintend the household, and that her condition has been such and is such as to require medical attention and treatment and nursing daily, all of which has caused loss of time to petitioner, who is a practising physician, and considerable expenditure of money.

Petitioner avers and charges that by the fault and gross, wanton and culpable neglect of said company not to have built at Cade station a station house and a waiting room for the reception and accommodation and safety of its passengers and of other persons having business with it, and by the fault and negligence of the officers and employés in charge of the train in the manner set forth, petitioner's wife has suffered damages in the sum of $20,000, for which the defendant is liable and responsible; that in like manner by the fault and the gross, wanton and culpable negligence of defendant, and by the fault and negligence of its officers and employés, as set forth, his child Tullia has suffered damages in the sum of $5000 for the bodily injuries received by her and the great physical pains and sufferings caused by the same, and that in his capacity of father and natural guardian of his said child he is entitled to a judgment against defendant for said amount for the separate benefit and use of his said child.

Petitioner further averred that in consequence of the injuries to his said wife and child he has suffered actual damages in expenses incurred for medical treatment and nursing of his said wife and child and in time lost in the further sum of $1000, for which said corporation is liable and for which he is entitled to a judgment; that under the circumstances and facts of this case, in justice, equity and law, as well as in the interest of and for the protection of the public, the said company is amenable and liable to punitive and exemplary damages.

That on the 3d day of June, 1892, Ben. Durand was in the employ

of the said defendant company as conductor in charge of the train on the branch road running from St. Martinsville to Cade station, and that he is still conductor thereof, having been retained in his same position by the defendant company; that between petitioner and the said Durand there has always existed friendly relations; that the said Durand, as conductor aforesaid, early on the morning of June 4, 1892, or about that date, availing himself of those friendly relations and friendly ties, and in a whining and begging way, with tears in his eyes, exhibiting great distress and expressing great fears of losing his position, which could only be averted by complying with his request, and in order to take undue advantage of petitioner, the said Durand informed petitioner, who was not present when his wife and child were injured, that the injury to petitioner's wife and child was purely accidental and unavoidable and was not occasioned by or through the fault or negligence of any of the employés in charge of said train, and requested, nay, insisted, that petitioner write a letter to W. F. Owen, superintendent of the defendant company, exonerating the officials in charge of said train, said letter to be transmitted by said Durand, with his report in the case, to said Owen. That when the said Durand made those statements petitioner was ignorant of the true facts of the case and petitioner had been continuously for about twelve or fourteen hours at the bedside of his wife, who was then in a very critical condition and suffering excruciating pain, besides his great anxiety for his said child, who also demanded his attention, and that petitioner was under great mental strain and anxiety consequent upon the serious injury and great sufferings of his wife and child and their then critical condition, and that while under this great mental strain and anxiety and being in full ignorance of the true facts of the case, and believing that the said Durand had not misrepresented the facts to him, petitioner did write the letter, as requested and insisted upon by Durand; that petitioner wrote said letter under a misapprehension of the facts superinduced by the false representations of Durand, who purposely and designedly misinformed petitioner and misled him as to the real facts of the case and the true situation of affairs, and that if said misrepresentations had not been made to petitioner by Durand, who was the conductor in charge of said train and in the employ of the defendant company, petitioner would not have written said letter, which was obtained from him through

the false and fraudulent misrepresentations made by the conductor of said train and in the employ of the defendant company, and who petitioner had every reason to believe was fully cognizant of all the facts of the case, and who petitioner had no reason to believe would purposely and fraudulently attempt to deprive him of his rights to obtain redress for his injuries, and by one who petitioner had no reason then to mistrust. That amicable demand for redress and payment for damages for said injuries to his wife and child had been made and that the same had been refused.

In view of the premises, petitioner prayed that the defendant be cited and that after due proceedings petitioner have and recover judgment against the said company for $20,000 damages for bodily injuries and pains and suffering of his wife as alleged; and for the further sum of $1000 damages for expenses incurred for medical treatment and nursing of his said wife and child, and for loss of time and expenditures as alleged; and that in his capacity of father and natural guardian of his minor child, Tullia De Mahy, he have judgment against the defendant, and it be condemned to pay for the separate benefit and use of the said minor child the sum of $5000.

Defendant filed an exception to the effect that the plaintiff had cumulated entirely distinct and separate actions in one suit; that he, as representing his wife, sued for $25,000 damages, and as representing his child, sued in her behalf for $5000 damages; and further, that he had mingled the charges of medical attendance and loss of time of himself, for which he asked judgment for himself for $1000, in this cumulated action, thereby doubly cumulating the suit, wherefore he prayed that the same be dismissed. Upon the filing of this exception, plaintiff moved "to amend his petition and to discontinue the portion demanding damages for injuries done to and suffered by his child Tullia, and for expenses incurred for medical attendance to said child, and for loss of time in attending to her, and to limit and restrict his action and suit against the defendant to petitioner's demand in damages for the injuries done to and suffered by his wife, and for expenses incurred for medical attendance of his said wife as alleged in the petition." This amendment having been allowed and made, petitioner prayed for judgment against defendant. The defendant filed an answer and a supplemental answer. In the answer it pleaded the general issue, and further answering said "that the accident which is alleged to have occasioned the injuries to plaintiff's

wife, for whom he sues in this action, was occasioned solely through the negligence, imprudence and want of ordinary care on the part of his said wife." In the supplemental answer defendant said "that plaintiff alleges negligence in the manner and form as set forth in the petition. That if respondent was guilty of any negligence in the premises, the same was not the proximate cause of the accident complained of, but that said accident had for its proximate cause the negligence and imprudence of plaintiff's wife."

The case having been tried before a jury, a verdict was returned in favor of the plaintiff for $20,000 damages, and a judgment having been rendered against defendant in conformity thereto, the latter appealed.

Plaintiff having declared in his amended petition "that he restricted his action against defendant to his demand in damages for the injury done to and suffered by his wife, and for expenses incurred for medical attendance to his wife as alleged in the petition," the issues before us for determination are those which result from the pleadings and prayer, as so narrowed and as affected *by those raised by defendant's answers.*

Plantiff's demand is grounded upon the following averments:

Petitioner further represents that the personal injuries to his wife, as well as the physical pains resulting therefrom, and the mental pains and sufferings undergone and endured by his wife, have been caused principally by the culpable, gross and wanton neglect of the Morgan Louisiana & Texas Railroad and Steamship Company not to have built at their station, at Cade, a station house or waiting room for the reception and accommodation and safety of its passengers and other persons having business with said company, and who have to wait there a considerable time for the arrival of expected trains, and also by the negligence of the officers and employés of said company then in charge of said trains to not have given proper and timely notice and warning to the persons left on the coach, in the aforesaid side-track or switch, of the coming and approach of the locomotive with its freight train for the purpose of coupling, as stated and set forth.

Defendant meets this demand by, firstly, a general denial of plaintiff's allegations; secondly, by asserting that the accident which is alleged to have occasioned the injuries to plaintiff's wife, was oc-

casioned solely through the negligence and imprudence and want of ordinary care on the part of his wife; and, thirdly, by a claim that if it was guilty of any negligence in the premises, the same was not the proximate cause of the accident complained of, but that said accident had for its proximate cause the negligence and imprudence of plaintiff's wife.

It will be observed that although the plaintiff, in his recital of the facts connected with the accident, alleges that whilst his wife and children and other ladies and children were occupying the coach on the branch train, awaiting the arrival of that from New Orleans, the children became more or less restless and moving about, and petitioner's wife tired of sitting so long got up, and while standing and watching her child all at once the locomotive, without having been seen by her and the other ladies on the said coach, got off the main track where it had been switching and was brought from behind, on the said side-track or switch, shoving before it two freight cars, and that in coupling the said freight cars to the baggage, or express, or smoking cars to the coach in which the ladies and children were, struck it with great force and violence, thereby shoving and pushing with equal force and violence against the coach in which they were, thereby producing and causing a violent and sudden jerk and concussion, "by which his little girl Tullia, who was then standing near to her mother, was thrown off the said coach," he nowhere charges that the coupling as made on that day was as to time, place or manner either unusual, unnecessary, improper or negligent.

The negligence relative to the coupling of which plaintiff complains is not as to its violence, but is declared to be the failure on the part of the officers and employés of the road to give notice that it was about to be made.

In designating the negligence which is made the basis of the action, that relating to the failure to construct the station house is charged as culpable, gross and wanton, whilst that relative to the failure to give notice is characterized simply as negligence without those adjectives attached.

We do not think that under the pleadings the character of the coupling is strictly an issue.

It may be well to say, however, that there is nothing in the record which would lead us to the conclusion that the coupling upon the

day in question was materially different from that upon other days, or that it was made with unnecessary force or shock.

The defendant company owns and operates a branch road from Cade station to the town of St. Martins. The branch was constructed about 1882. There is a freight depot at Cade, but no station house or waiting room for passengers. The custom seems to have been for passengers going to St. Martins, or coming from that place, to take or to retain seats in the passenger coach of the branch train, which usually arrived at Cade before the regular train, and there awaited its arrival. On the 3d of June, 1892, Mrs. De Mahy and her two children, one six years and the other two years and ten months old, took passage at St. Martins for Cade, where she expected to meet her sister coming from New Orleans. She was accompanied by several friends. There were a number of other ladies and children and some men upon the train as passengers. When the train reached Cade it was side-tracked, the locomotive detached and used for some time in switching freight cars which were to be and were afterward attached to it.

When the coupling was made of the locomotive and these freight cars to the coaches which had been side-tracked there resulted a very considerable jolt, which caused the smaller child of Mrs. De Mahy, who was standing on the platform of the passenger car, to be thrown down and to fall between the opening of that coach and that of a baggage or express car which was next to it. The mother, who was standing in the coach near the door, immediately ran out, jumped upon the ground, and thrust her arm under the still moving cars to reach and protect the child. In so doing her arm was caught and badly broken by one of the wheels. That she was very seriously injured and suffered great pain is beyond question. In all probability she will never regain fully, if at all, the use of the arm between the elbow and the shoulder.

On the day after the accident Dr. De Mahy, the husband of the injured lady, wrote as follows to the superintendent of the defendant:

ST. MARTINSVILLE, La., June 4, 1892.

DEAR SIR—Dr. Duperrier told me that you had made inquiry about the accident to my wife and child. Let it be distinctly understood that the railroad company is in no way to blame for it.

Mr. B. L. Durand, I must say, one of your best officials, has no reproach to receive from anybody, and I formally exonerate him from the least censure.

Hoping this will be favorably received, I am

Yours respectfully,

HENRY DE MAHY, M. D.

Dr. Duperrier, the gentleman referred to in this letter, says in his testimony that he was called as a physician to the residence of Dr. De Mahy the evening of the accident, on which occasion he asked him the question: How did the accident to your wife occur? to which he answered, "I can not blame the Railroad Company, nor any of the officials of the same for the accident."

Notwithstanding this declaration and letter this suit was instituted, plaintiff assigning as reasons for bringing it those which we have copied from the pleadings. During the trial defendant offered, but was not permitted, to prove that at the moment of the accident Mrs. De Mahy herself declared that she blamed no one but herself for the accident, and that no fault was attributable to defendant. Th declarations as part of *res gestæ* should have been admitted.

Plaintiff claims that the accident was caused by the fault and gross, wanton and culpable negligence of the defendant in not having built a station house and waiting room for the accommodation of passengers at Cade.

We are not called on to say in this case whether defendant was or was not under a legal duty and obligation to have built a station house, for upon the assumption that such was its duty, the failure to have done so was not the proximate cause of the injury. The case must turn upon other facts.

We have said that at the moment of the coupling the child was standing upon the platform of the passenger coach. The only witness of the plaintiff who testifies upon that subject expressly states that such was the case, and this is supported by a number of witnesses for the defence.

The evidence shows that the little girl had gone several times upon the platform and been brought back, and the imprudence of her being in such a position, independently of any question of coupling, was both manifest and recognized. Had she not been in this particular place she would have received no harm.

We can not hold otherwise than that it was negligence in the mother to have permitted a child of that tender age to have been where she was. That fact was the direct contributing cause of the falling.

This suit is not for damages for injury done to the child, but for those received by the mother, and for injuries by the mother not as the direct and immediate result of the coupling upon herself, but as the result of her going out after the jolt had taken place and she had received no personal harm therefrom and placing her arm under the car in her effort to guard and save her child. Plaintiff's counsel contend that in doing so she was not only not to blame, but that she showed the greatest heroism and greatest devotion. In this he is certainly correct, for the mother's conduct both at the time and afterward was such as to command the highest admiration, but counsel is mistaken in thinking that the contributory negligence which defendant charges was in that act. What he charges as contributory negligence was the failure of the mother to have kept the child inside of the coach and to have allowed her to go upon the platform. It is most deplorable that she should have lost sight of her, but for the consequences upon herself of having done so she can not hold the defendant responsible.

Very considerable testimony was taken as to whether the conductor had notified the passengers to keep their seats and informed them of the danger of standing upon the platform. There is testimony from several witnesses to the effect that the conductor, in a tone loud enough to be heard through the car, told different passengers to keep their seats—one of the witnesses stating that Mrs. De Mahy herself was one of those to whom he addressed himself. The conductor swears that he did tell the passengers to do so, and the testimony to the contrary is purely negative, and by parties who, being engaged in conversation, were not likely to have noticed this fact. There is no testimony as to whether he warned them of any danger to result from not observing his directions, but we think there was no particular danger to have been apprehended unless under such exceptional circumstances as occurred on this occasion (the going of so young a child upon the platform), which he could not fairly be expected to have anticipated.

The evidence shows that the employés of the company were, at the time of the coupling, at their usual respective posts for that par-

ticular work; and further shows that when the coupling took place the approach of the cars for that purpose could be seen through the baggage car by those who had not their backs turned in that direction, as seems unfortunately to have been the case with Mrs. De Mahy at that time.

For the reasons herein assigned it is hereby ordered, adjudged and decreed that the verdict of the jury be set aside and the judgment thereon rendered be annulled, avoided and reversed, and that there be judgment in favor of defendant against plaintiffs rejecting their demand and dismissing their suit with costs in both courts.

Mr. Justice Parlange takes no part.

No. 11,253.

AUGUSTE TETE VS. D. LANAUX, EXECUTOR.

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45 1343
113 455
45 1343
122 113

1. A person employed, *eo nomine*, "as a sugar broker," but who stipulates and consents to receive an annual fixed salary in lieu of commissions, and agrees to effect sales of sugar and molasses that are to be consigned to his employer, and for no one else; and obliges himself to exert *all* his personal influence to promote the interest of his employer, and to write all letters concerning the sugar and molasses market for his employer, and to make out all account sales of sugars and molasses in the transactions made by him – is a clerk in the ordinary acceptation of the term.
2. The leading and essential distinction between the capacity of a clerk and that of a broker is, the former hires his services, skill or industry, exclusively to another, while the latter is engaged to make bargains and contracts *between two* or *more persons* in matters of trade, commerce or navigation.
3. Courts of justice must look at the substance and essence of contracts rather than their form.
4. All contracts for the hire of labor, skill or industry, without any distinction, whether they can be performed by any other as by the obligor, unless there is some special agreement to the contrary, are considered as personal on the part of the obligor, but heritable on the part of the obligee.
5. Such a person is properly classed as a laborer within the meaning of R. C. C. 2749, and if turned away by his employer without sufficient cause he is entitled to make claim for the whole of the salaries he would have been entitled to receive had the full term of his services arrived.

APPEAL from the Civil District Court for the Parish of Orleans. *King, J.*

Albert Voorhies for Plaintiff and Appellant.

Chas. F. Claiborne for Defendant and Appellee.

The opinion of the court was delivered by

WATKINS, J. Plaintiff sues for an unpaid balance of salary as due him under a written contract with the deceased, on the theory that his employment was that of a clerk, or servant, at a certain fixed annual salary of $8000, payable in monthly instalments in advance—he having been sent away before the expiration of his term of service, and without any serious grounds of complaint.

To his demand the executor interposes two defences, to-wit:

1. That prior to the time plaintiff had entered upon the discharge of the duties imposed upon him under the stipulations of the written agreement between the parties, as renewed on the 2d day of July, 1892, Pierre Lanaux, obligee therein, departed this life on September 6, 1892, and that for that reason his claim is not founded in law.

2. That the existence and continuation of said contract—if it were at date of Lanaux' death in operation, and plaintiff in the active performance thereof—depended, in fact and in law, as well as in contemplation of the respective parties, upon both of them being in existence during its full term, and that the death of the obligee terminated said contract and put an end to the rights and obligations of both parties thereto, owing to the nature of the contract and the physical impossibility of its execution.

On the trial there was judgment in favor of the defendant, and the plaintiff has appealed.

The contract, provisions of which plaintiff seeks to enforce, is couched in the following terms, and same is reproduced as the best method of disclosing the salient points in controversy.

"NEW ORLEANS, July 1, 1890.

"AGREEMENT.

"It is hereby agreed between Pierre Lanaux, party of the first part, and Auguste Tete, party of the second part, as follows, to-wit: The party of the first part hereby employs the party of the second part as a sugar broker for the period of one year, from July 1, 1890, to effect the sales of all sugars and molasses that may be consigned to him, the party of the first part; and in lieu of the usual commissions allowed on such sales, to pay the party of the second part a fixed salary of three thousand dollars ($3000), payable two hundred and fifty dollars ($250) per month. And the party of the second

part, in consideration of said salary to be paid to him by the party of the first part, as aforesaid, agrees to effect such sales and to exert all his personal influence to promote the interest of said party, and to effect no sales of sugar and molasses, except those consigned to him (the party of the first part). And the said party of the second part further agrees to write all letters concerning sugar and molasses market of said party of the first part, and to make out all account sales of sugar and molasses in all said transactions made by him for said party of the first part.

"Signed in duplicate on the day of the month and year above written.

(Signed) "PIERRE LANAUX.
"AUG. TETE."

The parties place upon this contract two altogether different interpretations, thus introducing into this litigation the element of uncertainty that it becomes our duty to resolve. And it must be admitted that the question is not free from serious doubt, notwithstanding the lower judge held with the defendant.

The case must depend upon the *capacity* in which the parties respectively covenanted that the plaintiff should act—whether as broker, clerk, or agent—the plaintiff contending that his engagement was that of a *clerk*, while the contention of the executor is that he was employed as a broker, or agent—different principles of law appertaining to each.

The language of the contract is, that "the party of the first part hereby employs the party of the second part as a *sugar broker* for the period of one year," etc., and if that were all the stipulation it contained on the subject there would be no difficulty in solving the issue tendered. But the contract continues as follows, viz.: "to effect sales of all sugars and molasses that may be consigned to him, party of the first part; and in lieu of the usual commissions allowed on such sales, to pay the party of the second part $3000, payable $250 per month." And it further provides that in consideration of said salary the party of the second part "agrees to effect such sales and to exert *all his personal influence to promote the interest of said party (of the first part) and to effect no sales of sugar and molasses except those consigned to him (the party of the first part).*" And what, possibly, is the most significant provision of the agreement in this

respect is that it declares that "the said party of the second part further agrees to write all letters concerning the sugar and molasses market of said party of the first part, and to make out all account sales of sugar and molasses in all said transactions made by him for said party of the first part."

A clerk is one who hires his services to an employer at a fixed price under a stipulation to do and perform some specific duty or labor which requires the exercise of skill. "The broker is he who is employed *to negotiate a matter between two parties*, and who for that reason is the mandatory of both." R. C. C. 3016.

The leading and essential difference between a clerk and a broker is that the former hires his services exclusively to one person, while the latter is employed to make bargains and contracts between other persons in matters of trade, commerce and navigation. For the services of the former there is a fixed stated salary, while for those of the latter, a compensation, commonly styled brokerage, is allowed. Story's Agency, Sec. 26.

Putting the contract under consideration to this test, and what is the result?

The very first stipulation of the agreement is that the obligor was to effect the sales of all sugars and molasses that may be consigned to the deceased, and no other, and for his services was to receive a stated salary. His agreement bound him to act for and represent but one party, and "to exert *all* his personal influence to promote the interest of said party," and to effect no sales of sugar and molasses except those consigned to the deceased.

He further agreed to write all letters concerning sugars and molasses * * * of said *party of the first part*, and to make out all account sales of sugar and molasses in all said transactions.

This analysis of the various terms and provisions of the agreement clearly shows that plaintiff's capacity was that of clerk, and not of a broker. Consequently, while it is true that the declaration of the contract is that the plaintiff was employed as a *broker, eo nomine*, yet it is elementary that courts of justice are bound to give legal effect to contracts according to their true intent and meaning. And it has been correctly observed by this court that "the character of a contract is to be found *in the object the parties sought to accomplish*, rather than in the appellation they have given it." Bynum vs. Armstrong, 5 N. S. 161. Also, that "the nature of an obligation

depends entirely on the obligation it imports." Louisiana State Bank vs. Orleans Nav. Co., 2 An. 303. Again: "We are to look at the substance and essence of contracts rather than their form." Hutchins vs. Field, 10 La. 243.

Our conclusion being that plaintiff was a *clerk* of the deceased, and not a *broker*, the obligation of the latter was heritable and survived him, and is exigible against his executor and heirs, for the positive declaration of the code is that "all contracts for the hire of labor, skill or industry, *without any distinction*, whether they can be performed by any other *as by the obligor*, unless there is some *special agreement* to the contrary, are considered as *personal on the part of the obligor, but heritable on the part of the obligee.*" R. C. C. 2007.

Certainly the instant contract contains no "special agreement to the contrary," but in the most positive terms affirms its heritable character. The learned counsel of the defendant has industriously collated in his brief a large number of French and common law authorities favoring his theory; but however strong and persuasive they may be, they must yield to the positive fiat of the written law.

This is necessarily the end of the case, as there is no force in the defendant's contention that plaintiff had not, at date of Lanaux's death, entered upon the duties of his engagement. Lanaux was a commission merchant engaged in the sale of sugars and molasses. His first engagement with plaintiff was made on the 1st of July, 1890, for one year. It was renewed for another term on the 1st of July, 1891, and it was again renewed on the 1st of July, 1892.

The plaintiff was paid in advance his salary for the months of July, August and September, 1892, and he was at the time of Lanaux' death (on the 6th of September, 1892) absent temporarily on a sick leave. The engagement was complete and perfect notwithstanding the sugar market did not open, fairly, until after date of Lanaux' death. The term of his contract had run well nigh three months, when the obligee died. It was during the course of his employment that Lanaux' death occurred, therefore the cases cited by defendant's counsel are not in point. Triftin vs. Locke, 16 An. 19; Word vs. Winder, 16 An. 111.

Counsel further insists that the plaintiff was not *sent away* by the deceased in the sense of R. C. C. 2749, but that the obligee's death determined his services, as well as the contract. But the law de-

clares that the obligee's contract in such case is heritable; and the proof discloses that after Lanaux' death plaintiff called upon the executor and notified him that he was at his service, and that his reply was that he could return to Pass Christian, where he had been staying, and report again about the 25th of October to sell sugars and molasses under his contract.

It is, also, in proof that plaintiff returned at the time indicated to the executor's office, and proposed to go on with his work, when he was informed that he had changed his mind and could not retain him any longer, as he did not consider his contract good.

It is evident the plaintiff *was* turned away without any serious ground of complaint, and before his term of service had expired, in the sense of R. C. C. 2749; and that the executor is "bound to pay to such laborer the whole of the salaries which he would have been entitled to receive, had the full term of his services arrived."

But, in deciding this case as we have, and enforcing the plaintiff's contract in its entirety, we do not intend to establish an *inflexible* rule for the decision of this class of cases—the instant case being somewhat *sui generis*.

Art. R. C. C. 2007—upon which the case chiefly depends—must be construed with reference to other articles of the code upon the same subject-matter, and others which furnish rules for the interpretation of agreements generally.

And following this rule, we think the provisions of the following article applicable, viz.:

"However general be the terms in which a contract is couched, it extends only to those things concerning which it appears that the parties *intended* to contract." R. C. C. 1959.

Pursuing this theory, we are of opinion that the evidence shows that the magnitude and character of the business transactions of the estate of the deceased rendered plaintiff's services reasonably necessary during the whole term of his contract, and that, consequently, he is equitably as well as legally entitled to require complete performance on the part of the executor.

The amount plaintiff received for the months of July, August and September, 1892 ($750), being deducted, he is entitled to receive the balance of $2250, with legal interest from judicial demand.

The judgment rendered in defendant's favor must be reversed, and a decree pronounced in favor of the plaintiff.

It is therefore ordered and decreed that the plaintiff and appellant do have and recover of the defendant and appellee the sum of two thousand two hundred and fifty dollars, with legal interest from judicial demand and costs.

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46 934

No. 11,322.

THE STATE EX REL. JACOB MARX VS. JUDGE OF THIRD DISTRICT COURT, PARISH OF UNION, ET AL.

In case a party makes application for a respite in the court of one parish, and subsequently to same being granted he permanently changes his domicil to another parish, it is competent for a creditor, complaining of his failure to comply with the award, to proceed, by rule taken in the court of first instance, to compel him to make a surrender under the insolvent law. Act 134 of 1888 amending R. C. C. 3093 is ample warrant for thus proceeding.

APPLICATION for Writ of Prohibition.

Dawkins & Dawkins and *Lazarus Moore & Lemle* for the Relator.

Everett & Thomas for the Respondent.

The opinion of the court was delivered by

WATKINS, J. Relator alleges that about the 1st of April, 1892, while he was domiciled in the parish of Union, he filed a petition in the respondent's court, petitioning his creditors for a respite, and that same was subsequently granted; that subsequently he removed from the parish of Union to the parish of Ouachita, and there established his permanent domicil, to which he had intermediately removed his property and effects; that on the 23d of August, 1892, subsequent to the relator's change of domicil, one of his creditors appeared and filed an opposition in the original respite proceedings, alleging the relator's default and failure to make the first payment contemplated, and prayed a rule and judgment condemning him to make a surrender under the insolvent laws of the State; that he appeared and excepted to the jurisdiction of the court *ratione personæ*, because of his domicil being in the parish of Ouachita; and same was by the court overruled, and this writ and relief applied for.

The respondent judge concedes the facts to be as stated, but denies their sufficiency to justify the maintenance of the writ.

Relator's proceedings were predicated upon the provisions of Sec. 1 of Act 134 of 1888, amending R. C. C. 3093, which are as follows, viz.:

"And if any debtor having obtained a respite shall fail or neglect to furnish, when required by order of court, the security herein provided for * * * or shall fail or neglect to make payment to his respective creditors, according to the terms of said respite, any creditor thereby interested may proceed summarily against such debtor, *by rule taken in the respite proceedings*, to show cause why the judgment decreeing such respite should not be vacated and annulled, and why the debtor should not forthwith make a cession of his property to his creditors."

The precepts of that statute have been closely followed, and there has been suggested no unconstitutionality of the law, which is purely remedial in character.

It is a well settled precept of jurisprudence, as it is a well recognized principle of law, that judicial proceedings once regularly inaugurated can not be annihilated by any act of the parties to judgments and decrees then rendered.

On this question the principles announced and the authorities collated in Heirs of McGehee vs. McGehee, Administrator, 41 An. 657, are quite instructive.

There is no reason to doubt the force or applicability of the legislative act authorizing the creditor's rule to be taken in the original probate proceedings, irrespective of the domicil of the relator acquired in a different parish, subsequent to their institution; and therefore the prayer of the relator should be refused, and it is ordered and decreed that the restraining order herein granted be set aside, and a writ of prohibition refused at the relator's cost.

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47 191

No. 11,875.

THE STATE EX REL. O. BILLON, DISTRICT ATTORNEY, VS. A. L. BOURGEOIS, SHERIFF.

Acts denounced by Art. 196 of the Constitution in a prior term of office, by any officer who is his own successor, may form the foundation for a suit for removal from office, under Art. 201 of the Constitution.

State ex rel. District Attorney vs. Sheriff.

Acts committed by an officer in no way connected with his official conduct can not form the foundation for a suit under Art. 201 of the Constitution.

APPEAL from the Twentieth District Court, Parish of St. James. *Guion, J.*

Oscar Billon, District Attorney, and *F. C. Zacharie* for the Relator and Appellant.

Sims & Pochè for the Respondent and Appellee.

The opinion of the court was delivered by

McENERY, J. This suit was instituted in the name of the State of Louisiana, by the district attorney of the parish of St. James, on the relation of certain resident citizens and tax-payers of said parish, under the provisions of Art. 201 of the Constitution and Act No. 135 of 1880, to remove the defendant from his office as sheriff of the parish of St. James, to which he was elected in April, 1892, and was duly qualified the following July. The grounds for his removal are set forth in eleven specifications in the plaintiff's petition, charging certain acts of malfeasance, non-feasance, etc., some of which are alleged to have been committed by him during a previous term of office as sheriff and others during his present term.

The defendant filed exceptions to the petition, which exceptions the District Court sustained as to the first, second, third, fourth and ninth specifications, and to that extent dismissed the petition, and as to the other specifications the court overruled the exceptions. From that part of the judgment sustaining said exceptions the plaintiff and relators have appealed.

The specifications to which the exceptions of the defendant were sustained are as follows:

1. That said Adam Livain Bourgeois, being then sheriff of the parish of St. James and having been ordered under a writ of *fieri facias*, issued on the 29th day of January, 1891, in the suit of J. B. C. Graugnard vs. Lucius Forsyth, No. 1500 of the docket of the Twenty-second Judicial District Court, to seize and sell for cash certain property, to-wit: Pike's Peak plantation, situated within the parish of St. James, and the appurtenances thereto, for cash, did fail to sell the same for

cash, as ordered, and was thereby guilty of non-feasance and misfeasance in office.

2. That thereupon and thereafter the said Adam Livain Bourgeois, as sheriff in the above entitled cause, did, on the 8th day of April, 1891, make a false return on said writ, in which return he certified that he had sold the property hereinabove described for cash, which was paid to him by the purchaser, when in truth and in fact no cash was demanded or received from the purchaser, but said sale was fraudulent and said return false and fraudulent, and the said sheriff thereby was guilty of misfeasance, corruption and gross misconduct in office.

3. That said Adam Livain Bourgeois, sheriff as aforesaid, did, on the 17th day of March, 1891, execute a deed to the purchaser at said sale, which deed he filed in said suit June 26, 1891, and specified therein that he had received in payment of the price of said sale and adjudication a certain amount of money in cash as payment, when in truth and in fact no cash was received or paid unto him, the said sheriff, by the purchaser or other person, and said deed was false and fraudulent, and said sheriff thereby was guilty of misfeasance, corruption and gross misconduct in office.

4. That on the 26th of June, 1891, said cause being on trial on a rule to distribute the proceeds of the sale aforesaid, said Adam Livain Bourgeois, sheriff as aforesaid, being called as a witness and being duly sworn, did depose under oath that he had in his possession a certain portion of the proceeds of said sale in cash, when in fact and in truth said testimony was false and untrue, and said sheriff did not then have in his hands or possession the funds as falsely testified to by him, and said sheriff was thereby guilty of perjury, misfeasance and gross misconduct in office.

9. That one David Smith, a resident of the parish of St. James, was on the 2d day of July, 1891, informed against by the then district attorney of the parish of St. James, on four distinct informations, viz.: Attempt to commit rape, carrying concealed weapons, entering plantation, and assault with dangerous weapon, and four bench warrants were issued by the Twenty-second Judicial District Court for his arrest and detention, and delivered to the sheriff for execution on same day or thereabouts; that said Adam Livain Bourgeois, sheriff aforesaid, failed to execute said warrants up to this time, although said Smith resided and continued to reside at a point one

mile from the said court house, pursuing his usual avocation, and could have been readily apprehended up to January 1, 1892, at which time said Smith became a fugitive from justice on a capital charge, wherefore petitioners charge said Adam Livain Bourgeois, sheriff aforesaid, with non-feasance and gross misconduct in office.

To the petition of plaintiff and relators the defendant presented and filed the following exceptions:

1. That the allegations contained in the first, second, third, fourth ninth, tenth and eleventh grounds or specifications of said petition do not set forth any cause of action against this exceptor.

2. That the allegations contained in the first, second, third, fourth and ninth grounds or specifications of said petition do not disclose any cause of action or right of action in the plaintiff and relators herein, because the offences therein specifically charged against this exceptor are expressly averred to have been committed prior to the date of his induction into the office of sheriff of said parish pursuant to his election to said office, on the 19th of April, 1892.

3. That the allegations contained in the tenth and eleventh grounds or specifications of said petition are vague, uncertain and indefinite as to time, place and circumstances, and wholly insufficient to enable him to make a defence thereto or to put him on his defence.

4. That this court is absolutely without jurisdiction *ratione materiæ* of the matters and charge set forth in said first, second, third, fourth and ninth grounds or specifications of said petition, because this exceptor was elected to the office of sheriff of the parish of St. James, and *ex-officio* tax collector thereof, at the last election, held on the 19th of April, 1892, and thereafter duly qualified and was inducted into said office, and the offences charged against exceptor in the said specifications of said petition are averred to have been committed at a time anterior to exceptor's said induction into office and his present term of office.

The allegations in first, second, third and ninth specifications are sufficiently definite and explicit. It was not essential for relators to aver a negative therein. It is very true the matters contained in said specifications are subject to explanation, as the parties to the suit could have consented to the acts of the sheriff. But this is a matter of defence on the trial of the case. The specifications charge that said acts were misfeasance, non-feasance in office, and that he made false return on his writ, and that said acts were gross miscon-

duct and corruption in office. These averments negative the fact that these acts were done under the direction and by the consent of plaintiff in exception.

The fourth specification can not be sustained, as the act charged was not done in any official capacity. He was sworn as a witness in the case, and his oath was not an official act. The facts sworn to were shown by his return, which in another specification is alleged to be false and fraudulent. State vs. Kellam, 4 La. 495.

Specifications first, second, third and ninth are of official acts, alleged to be misfeasances, committed before the defendant sheriff was inducted into office, after his election to a second term, on 19th April, 1892. These fall under the second and fourth grounds of defendant's exceptions.

The defendant sheriff has been uninterruptedly in office since the commission of the acts complained of.

There was by his re-election no interruption in his official tenure. At no time was there an *interregnum*. He was by the Constitution to continue in office until his successor was elected and qualified. He was his own successor, the identical officer in both terms against whom charges are preferred.

The intention of Art. 201 of the Constitution is to remove from office an incumbent who has been guilty of any of the offences mentioned in Art. 196 of the Constitution, while he is in office.

It is immaterial therefore whether they were committed during his present or immediate proceeding term of office. His inability to hold the office results from the commission of said offences, and at once renders him unfit to continue in office. The fact that he had been re-elected does not condone and purge the offence.

The sheriff was elected in pursuance of the provisions of the Constitution declaring what acts committed by him should be sufficient for his removal. This Constitution was made by the people in their sovereign capacity, and by electing an officer they can not modify its provisions.

In the election of defendant no question was submitted by which Arts. 196 and 201 were changed.

Neither of these articles specify in what time a suit to remove an officer shall be instituted, whether in one term or another.

Nor do they specify any limitation as to the offence.

We must therefore conclude that the articles were intended to re-

move an unworthy officer, while in office, irrespective of the fact whether the act complained of was committed during his first or a subsequent term.

But we are not without authorities and precedents on this point. The learned counsel of defendant urge, however, that a suit under Art. 201 of the Constitution can not be assimilated to proceedings by impeachment.

The effect of the conviction may be different, but the laws applicable to the commission of the offence are the same.

The great weight of authority is that an officer may be impeached while in office for acts committed in a prior term. Trial of Judge Barnard, Court of Impeachment, New York; trial of Judge John McGunn, Court of Impeachment, New York; trial of Judge Prindle, Court of Impeachment, New York.

And in a late case, State vs. Hill, N. W. Rep., Vol. 55, p. 794, Supreme Court of Nebraska, it is stated in the opinion of the court that the ruling in the case of Judge Barnard during his second term for acts committed in his first term of office has been followed in the case of Judge Hubble, of Wisconsin, and on the trial of Governor Butler, of Nebraska. In this case the Supreme Court of Nebraska says, in its opinion:

"There was good reason for overruling the plea to the jurisdiction in the three cases just mentioned. Each respondent was a civil officer at the time he was impeached, and had been such uninterruptedly since the alleged misdemeanors in office were committed.

"The fact that the offence occurred in the previous term is immaterial. The object of the impeachment is to remove a corrupt or unworthy officer. If his term has expired and he is no longer in office that object is obtained and the reason for his impeachment no longer exists, but if the offender is still an officer he is amenable to impeachment although the acts charged were committed in his previous term of the same office."

We concur in these reasons.

This court intimated in State ex rel. Attorney General vs. Cheevers, 32 An. 946, that it entertained the same views as expressed above.

It is therefore ordered, adjudged and decreed that the judgment appealed from be amended so as to reverse the decree sustaining exceptions as to specifications first, second, third and ninth, and in other respects it be affirmed, appellees to pay costs of appeal, and case remanded to be proceeded with in due course of law.

No. 11,841.

THE STATE OF LOUISIANA VS. NICK WILLIAMS.

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The accused pleaded not guilty when he was arraigned.

Subsequently he substituted the plea of guilty of a minor offence. to that charged.

The plea was accepted by the State, and the case called at the time for trial was, in consequence, not submitted to a jury.

More than ten months had elapsed from the date of his arraignment to that on which he applied to substitute the plea of not guilty to the plea of guilty.

The motion to withdraw the plea was not timely made, during the session, and granting the motion would have operated a continuance.

The court states that the accused was represented by able and experienced counsel during the trial, and that the plea of guilty was not unadvisedly entered.

The court in proper cases will freely exercise its discretion by allowing the plea of guilty to be withdrawn, and not guilty pleaded in its place, but such a discretion will rarely, if ever, be exercised in aid of an attempt to rely upon a mere dilatory or formal defence.

APPEAL from the Eleventh District Court, Parish of St. Landry. *Perrault, J.*

M. J. Cunningham, Attorney General, and *E. B. Dubuisson*, District Attorney, for the State, Appellee.

John N. Ogden for Defendant and Appellant.

The opinion of the court was delivered by

BREAUX, J. An indictment was found against the defendant on November 15, 1892, under Sec. 791 of the Revised Statutes, charging him with stabbing and striking with intent to kill and murder one Henry Johnson.

On the 16th day of November, 1892, he interposed a motion to quash the indictment, which was overruled.

On November 25, 1892, he was arraigned and pleaded not guilty. The case was assigned to be tried on that day.

It was, subsequently, reassigned on several days.

On the 20th day of September, 1893, the plea of guilty of a lesser offence than that charged was entered.

On the 2d day of October a motion to withdraw the plea of guilty was filed.

The case comes up for review on the bill of exception taken to the court's ruling, overruling the motion to withdraw the plea of guilty.

The court's reasons, as stated in the bill, are: that the accused was represented by counsel able and experienced, with knowledge of the facts and circumstances, who defended him during the trial; that the plea of guilty of an offence less in degree than that charged was made and entered more than ten months after the arraignment of the defendant, and at a time when the case was called for trial and nothing to prevent the trial had the plea of guilty not been presented and accepted by the district attorney.

The trial judge further states that the motion was too late, as it would, had it been granted, have necessarily operated a continuance of the case.

The withdrawal of the plea of guilty should not be denied in any case where it is in the least evident that the ends of justice will be subserved by permitting not guilty to be pleaded in its place.

It is proper to grant the withdrawal if the accused makes it appear that an error has been committed.

The least surprise or influence causing him to plead guilty when he had any defence at all should be sufficient cause to permit a change of the plea from guilty to not guilty.

The records and the statement of the trial judge do not disclose that there was any good ground to grant the application.

The plea presented and overruled prior to arraignment, the time that had elapsed since the arraignment, and the late day in the session the motion to withdraw the plea of guilty was filed, preclude the possibility of concluding that the accused has been prejudiced by the ruling of the lower court.

The discretion in refusing to allow the withdrawal of a plea and substituting another "will rarely, if ever, be exercised in aid of an attempt to rely upon a mere dilatory or formal defence." Bishop on Criminal Jurisprudence, 3d Ed., Sec. 124.

The offence to which he pleaded guilty was a minor offence to that charged; that fact also, supports the statement of the trial judge that all the facts and circumstances show that the plea was offered advisedly.

In the case of State vs. Delahoussaye, 37 An. 552, nineteen days had elapsed since the arraignment; the jury had been discharged; the relief asked would have caused a continuance; the court sustained the ruling of the trial judge in refusing the withdrawal and permitting another plea.

In the case at bar there are grounds even more conclusive upon which to sustain the judge's action.

The discretion was soundly exercised, and his ruling was legal.

Judgment affirmed.

No. 11,376.

MRS. LILLIAN W. EGAN AND HUSBAND VS. A. HART ET ALS.

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1. The State having located a public levee and awarded to a contractor the work of constructing it, the fact that third persons have bound themselves to the contractor to supplement the contract price by subscriptions of money does not impair the public character of the work.
2. Act 74 of 1892 creating the Caddo Levee District does not impair the power of the Governor, under Act 33 of 1879, to contract for public levees in said district to be paid for with moneys in the general engineer fund.
3. The Board of State Engineers has the power to close Bayou Pierre by a dam, which is part of the public levee system of the State. The upper part of Bayou Pierre is not navigable; besides, that stream is wholly within the State and the authority of the Legislature over it is complete.
4. The act of Congress admitting Louisiana into the Union does not forbid the Legislature from closing by a dam such a stream as Bayou Pierre.
5. The State, in locating its public levees, acts in the exercise of its police powers, and private injury resulting therefrom is *damnum absque injuria*.

APPEAL from the First District Court, Parish of Caddo. *Taylor, J.*

J. C. Egan and *F. G. Thatcher* for Plaintiffs and Appellants.

Land & Land for Defendants and Appellees.

J. R. Land, District Attorney, for the State of Louisiana, Intervenor and Appellee.

The opinion of the court was delivered by

PARLANGE, J. This is an injunction suit to restrain the construction of a dam across Bayou Pierre.

Plaintiff owns a plantation in Caddo parish, known as Grigsby's Island, and which is bounded on one side by Red river and on the other sides by bayous or streams connecting with Red river. Bayou Pierre bounds her plantation in the rear. She complains that A.

Hart, and H. B. Richardson, pretending to act as chief engineer of the Board of State Engineers, and F. M. Kerr, pretending to act as engineer of said board, have combined and conspired to build a dam across Bayou Pierre at a distance of about one mile and a half from Red river, and of about a quarter of a mile from the lowest point of her land. She alleges that the defendants have announced their intention to close Bayou Pierre, and have actually begun the work necessary to carry out their purpose. She alleges that the defendant Hart was employed almost wholly by private persons to do said work. That the necessary funds were supplied by interested private parties who, for their own selfish interests and from no public motive, have entered into the combination to dam said bayou. That any pretended contract between Hart and the State is a mere pretext or subterfuge and was intended as a cloak to cover their illegal acts, and with the hope to shield themselves from the legal consequences of their wrongful acts. She avers specially that, if the acts of defendants are claimed to be done by virtue of any contract with the State or its officials, and in accordance with law, the Board of Engineers has no power to close such a natural outlet as Bayou Pierre is, and she says that since the passage of Act 74 of 1892 the Board of Engineers is without power to advertise for bids and to let contracts for building public levees in Caddo parish and for closing Bayou Pierre; but that said power is lodged exclusively in the Board of Commissioners of the Caddo Levee District, and that, if the Board of Engineers has let a contract for closing Bayou Pierre since the passage of Act 74 of 1892, it has done so without authority from the district commissioners. That, if the authority is claimed under Sec. 18 of Act 74 of 1892, said section is unconstitutional.

Plaintiff avers that the effect of closing Bayou Pierre will be to increase the volume of water in Red river, thereby rendering her lands more liable to overflow and requiring her to add to her own levees already built. That she will be compelled to surround her plantation with high levees, costly to maintain and which would leave her plantation as a basin in which rain and seepage water would stand. She alleges damages to the amount of $6000, of which $1000 are claimed for attorneys' fees and $5000 for the depreciation in the rental and selling values of her plantation and the disturbance of her tenants and laborers. She prays for the damages claimed and for the removal of the dam.

By an amended petition, plaintiff avers that Bayou Pierre is a navigable stream, and that the State has no power to close it.

The State intervened and alleges that the work enjoined is a part of its public levee system. That the Board of State Engineers, in the discharge of its duties, recommended the closing of Bayou Pierre and the continuation of a public levee from the hills north of and across Bayou Pierre to the Dixie plantation, a distance of two miles and three-quarters, in order to protect the adjacent country from overflow, and as a basis of a system of levees to be built as rapidly as possible; that bids for said public work were advertised for according to law; that the bid of the defendant Hart was duly accepted, and a contract was made with him by the Governor; and that Hart gave bond and security for the faithful performance of the work; that the contract price is payable out of the general engineer fund, over which the District Board of Commissioners has no control, and that the Board of State Engineers has the power, under the laws of the State, and especially under Act 60 of 1886, to determine in what part of Caddo parish its *pro rata* of said fund should be expended; that said Board of Engineers has the exclusive power of locating all levees in the Caddo Levee District, and of determining what outlets shall be closed or opened; that such power was not abridged by Act 74 of 1892, but, on the contrary, was made exclusive by Sec. 18 of said act; that said act makes it the duty of said Caddo District Levee Board to provide the means to carry out the recommendations of said Board of Engineers by taxation, but that these means are intended to be in aid of the general engineer fund.

The injunction was dissolved on bond.

Defendants answered, making substantially the same averments as the State.

After trial the district judge dissolved the injunction and dismissed the suit, condemning plaintiff to pay the defendant Hart $850 as damages, of which $250 are for attorneys' fees.

Plaintiff has appealed, and the defendant Hart, in his answer to the appeal, prays that the attorneys' fees be increased to $1000.

Plaintiff's allegations that the closing of Bayou Pierre is the result of a combination and conspiracy for private interests are clearly and abundantly disproved by the record. The work complained of is a public work undertaken, in accordance with law, by the agents of the State, the State Engineers. It is a part of the public levee sys-

tem of the State. It was being carried on by the State Engineers in the performance of the duties imposed upon them by law. The work was surveyed; it was reported and recommended to the Governor. The Governor advertised for proposals to do the work. The contract was awarded to Hart, and was signed by the Governor and by Hart. The latter gave security for the performance of the work. It is clear that no possible damage could have resulted to plaintiff from the mode in which Hart obtained the contract, and that if she has suffered any injury it was not because of the mode of awarding the contract but because of the acts done under the same.

This is not a case in which a requirement of law provided in the interest of a person has not been observed.

The fact that private persons bound themselves to the contractor, Hart to supplement by subscriptions of money the price which he was to receive from the State affects in no manner the public character of the work. These were obligations of third parties to Hart. They did not and could not affect in the least the control of the State over the work, nor change, nor impair the public nature of the undertaking. The State was the beneficiary of these private subscriptions, as doubtless they contributed to enable Hart to undertake the building of nearly three miles of levees for the low price set out in his contract with the State. But the work itself remained absolutely a public work.

Speaking of the nature of the work the district judge says:

"It is a public work, planned and located by State authority, and is a part of a system of levees ordered by the State for the prevention of overflows. It is the initial point of a line of levees, the propriety, location and construction of which have been determined by the State, acting through the State Board of Engineers, its accredited and duly authorized agents. It begins on the highlands on the west bank of the bayou and extends thence across the bayou to Hart's Island, and from there to Dixie plantation on Red river."

The United States Government has contributed $4000—a sum equal to the price of Hart's contract with the State—toward the cost of construction of the line of levees, of which the dam in question is a part. Manifestly the claim that such a work, undertaken by the State with the aid of the general government, is the work of private persons for private and selfish motives is absolutely without foundation.

Plaintiff contends, as stated, that since the passage of Act 74 of 1892, which created the Caddo Levee District, the right and power to advertise and contract for levees in Caddo parish are exclusively vested in the District Board of Commissioners. This position is untenable. There is no authority to support it. The Constitution makes it the imperative duty of the General Assembly to maintain a levee system in the State. Art. 214 of the Constitution provides that the General Assembly may divide the State into levee districts, and provide for the appointment or election of levee commissioners, who shall, in the mode and manner to be provided by law, have supervision of the erection, repairs and maintenance of the levees in the district, and to that effect they may levy a limited tax on the taxable property within the district. It is clear that the creation of levee districts is left to the discretion of the General Assembly. It is equally clear that the method and manner in which the commissioners when created are to have supervision of the levees within the district are also left to the discretion of the General Assembly. Peart vs. Levee District, 45 An. 422.

A levee district is one of the instrumentalities which the General Assembly may use in performing its duty of maintaining a levee system in the State. The Constitution does not provide, either expressly or by implication, that when a levee district is created, the General Assembly shall be powerless to employ any other instrumentality than that of the levee district within its limits.

The general engineer fund, created by Act 33 of 1879, has been frequently and fully recognized by the General Assembly since the adoption of the present Constitution. Under Act 33 of 1879 the power of the Governor is clear to contract for building levees with moneys in the general engineer fund.

Equally clear is the power of the Board of State Engineers, acting within their official scope and duty, to cause to be closed the bayou across which the dam in question was being constructed at the time this suit originated. It is a necessary incident of their powers and duties under said Act 33 of 1879. The action of the General Assembly would have been futile indeed if, with full knowledge of the topography of the State, it had charged the State Engineers with the great duty of protecting the alluvial part of the State from overflows, but had withheld from them the power to build levees across bayous and sloughs. Act 78 of 1886 assumes as a matter of course

that the Board of State Engineers has the power, and said act provides certain requisites to be observed in constructing levees across bayous and sloughs. But in the instant case, if any doubt could have existed as to the power, Sec. 18 of Act 74 of 1892 creating the Caddo Levee District would have removed it, by providing that the State Engineers are authorized "to survey and locate, repair or remove or change any and all levees in the district and are specially authorized to cause to be closed by levees, dikes or otherwise, such outlets, bayous, or sloughs, or to open the same, as in their judgment may be necessary to carry out the object of this act, and are solely charged with the responsibility of the location of all levees in said district." This section violates no provision of the Constitution.

As to plaintiff's contention that Bayou Pierre is a navigable stream, we have carefully considered the voluminous testimony on that part of the case and we are clear that the upper part of Bayou Pierre, in which the dam in questien is situated, is not navigable, and that the navigation of even the lower part of Bayou Pierre, a considerable distance below the dam, is attended with many obstacles and difficulties. On this point the district judge says: "From Grand Ecore where it (Bayou Pierre) enters Red river, to a point some miles below its junction with Tone's Bayou—a stream flowing out of the river—Bayou Pierre has been frequently navigated by steamboats. But from the point of junction to the dam in question, it has never been navigated and is unnavigable. Between these two points it is nothing but a high water outlet, going dry every summer at many places, choked with rafts and filled with sand, reefs, etc. It has no channel; in various localities it spreads out into shallow lakes and over a wide expanse of country and is susceptible of being made navigable just as a ditch could be if it were dug deep and wide enough and kept supplied with a sufficiency of water.' We fully concur in this finding. Besides, Bayou Pierre is wholly within the State, and the authority of the Legislature over it is complete. Hamilton vs. R. R. Co., 34 An. 975; Boykin vs. Shaffer, 13 An. 129.

There is no force in plaintiff's contention that the act of Congress admitting Louisiana into the Union forbids the General Assembly from closing by a dam such a stream as Bayou Pierre. Boykin vs. Shaffer, 13 An. 129; Hamilton vs. R. R., 119 U. S. 285; Williamette Iron Bridge Co. vs. Hatch, 125 U. S. 1.

In Peart vs. Levee District, quoted above, and in the cases therein cited, this court has said that in locating and building her public levees the State acts in the exercise of the police power "and that private injury resulting from the legitimate exercise of this legal right is *damnum absque injuria*, to which the individual must submit as a sacrifice to the public safety and welfare." The doctrine applies to the instant case.

Plaintiff's plantation is an island surrounded by levees, except where the banks are sufficiently high without them. There is evidence strongly indicating that her plantation is by nature in the shape of a basin, the land sloping on all sides to the centre. However this may be, it seems clear that the condition of her property, even before the building of the dam, must have been highly unfavorable to drainage. Whether the effect of the dam at a distance of a quarter of a mile from her property will be to seriously damage it, is in a great measure conjectural. She has neither alleged nor shown any interest in the navigability of Bayou Pierre. However, whether she has suffered damage or not, she is not entitled to the relief she prays for.

The appellee Hart prays for an increase of the damages awarded, but we see no reason to disturb the finding of the district judge.

Judgment affirmed at plaintiff's costs.

Rehearing refused.

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No. 11,281.

MRS. M. V. DELESDERNIER VS. H. J. DELESDERNIER, HER HUSBAND.

When a husband appeals from a judgment rendered against him in favor of his wife for a separation from bed and board, and for $1600 for paraphernal funds belonging to her, converted to his own use, the wife is not entitled to have the appeal dismissed *quoad* the moneyed judgment as being below the constitutional jurisdiction of the Supreme Court.

A separation from bed and board carries with it a separation of property. A moneyed demand accompanying an action for such separation is an incident of the main action, and becomes inseparably connected with it as so brought.

Repeated acts of drunkenness, followed by occasional spells of sobriety and moderate drinking, with the habit of drinking so fixed that temptation to drink can not be resisted, will constitute habitual drunkenness within the meaning of Art. 128 of the Civil Code. And if it is of such nature as to render the living together of the spouses insupportable, the complaining party is entitled to a decree of separation from bed and board.

Notes given by the husband to the wife for her paraphernal funds used by him are admissible to prove the indebtedness of the husband to the wife.

The husband is bound to support the marriage charges, and the wife can only be called to contribute one-half of the income of her paraphernal effects, of which she retains the administration.

APPEAL from the Civil District Court for the Parish of Orleans. *King, J.*

F. Rivers Richardson for Plaintiff and Appellee.

Defendant *in propria persona.*

ON MOTION TO DISMISS

The opinion of the court was delivered by

NICHOLLS, C. J. The plaintiff sued the defendant for a separation from bed and board, and for a moneyed judgment for the sum of $1610 for paraphernal funds of hers which her husband had received and converted to his own separate use and benefit.

The district judge rendered judgment in her favor in conformity to the prayer of the petition.

The defendant appealed, and the plaintiff has filed in this court a motion to dismiss the appeal in so far as it concerns the moneyed judgment on the ground that it is below our constitutional jurisdiction as to amount.

Separation from bed and board carries with it separation of goods and effects. C. C. 155.

When the plaintiff suing for a separation from bed and board asked for a separation of property and for judgment for moneys received by the defendant during the marriage belonging to her and converted by him the action was an entirety, the demand and prayer for aseparation of property and for a moneyed judgment for a specific amount being merely an incident of the suit, with which it is now inseparably connected.

As matters stand the action is of the nature of a mixed action, where the principal demand carries its incidental demand along with it, as does, for instance, a petitory action, when it is accompanied by a demand for fruits and revenues.

There is no analogy between this case and that of Favrot vs. Baton Rouge, 38 An. 280.

In that case we dismissed no appeal, but limited our inquiries on appeal to the single issue which the Constitution directed us to consider in such matters. The whole case was before us on a single special issue. When we disposed of that our duty under the Constitution ended.

In the case at bar there is a case before us properly and legally within our jurisdiction on a main demand with an incidental demand properly attached to it by appellee—both having been decided by the district judge in one and the same judgment, and incapable of being separated from each other on appeal.

The motion for the dismissal is not well taken and the application is denied.

ON THE MERITS.

MCENERY, J. The plaintiff instituted suit for separation from bed and board from her husband, alleging as reasons therefor habitual drunkenness, cruel treatment and public defamation of her character on part of the defendant husband.

The defendant's answer, setting out with exact particularity the dates when he was intoxicated, the duration of the time he was under the influence of liquor, the intervals of entire sobriety and the stated times of the use of liquor in moderation, establishes the fact that, notwithstanding these intermittent periods of sobriety, the defendant was an actual and confirmed inebriate. Mack vs. Handy, 39 An. 493.

The evidence shows that the excesses of defendant were of such character as to render the living together of plaintiff and defendant, as man and wife, insupportable to the wife.

The defendant, on October 12, 1892, filed a suit to have his wife interdicted. Two days after the institution of this suit the present suit was filed. The defendant objects to this suit on the ground that the wife was incapable of acting after the petition for interdiction had been filed. There is no provision of the statute law, nor is there any article of the code which prevents the defendant in proceedings to interdict him, from performing acts, such as bringing suits and making contracts. The validity of these acts depends upon the judgment rendered in the case. C. C., Art. 401.

This interdiction suit was dismissed on defendant's failing to give security for costs. In his answer he reiterates the allegations therein made, and on the trial failed to offer any evidence to sub-

stantiate the same. The averments in the petition unquestionably were public defamation of the wife, and alone would entitle her to the decree prayed for. C. C., Sec. 4, Art. 138.

According to defendant's answer the wife's paraphernal effects, in cash, amounted to $1900. The husband used the money, and a part of it was for board, which he claims the wife was compelled to pay toward making the marriage charges.

The code provides that if all the property of the wife be paraphernal and she have reserved to herself the administration of it, she ought to bear a proportion of the marriage charges equal if need be to one-half her income. Art. 2389.

There was no revenue from this money. It was on deposit and employed by the husband for his own use and for the expenses of maintenance, which, under Article 120 of the code, he was bound to bear, unless, as provided in Article 2389, the wife administered her paraphernal effects, when one-half the income could be used for marriage charges.

A part of the husband's indebtedness to his wife was evidenced by promissory notes. These were offered in evidence and admitted as acknowledgments of the debt. The ruling was correct. The wife was not suing on a contract made with the husband during marriage, but was claiming restitution of her paraphernal effects used by the husband, and which he is bound to restore to her on the dissolution of the community.

The husband can acknowledge the debt due his wife. To preserve her legal mortgage or privilege, it is made the duty of the husband under oath, where the evidence is not in writing, to make a statement and record the same of the amount due the wife. C. C. 3349.

His acknowledgment in writing, given at the time the paraphernal effects were used by him, in the form of a promissory note, is therefore admissible evidence to prove the fact of the use of the money of the wife and his indebtedness to her. Burns vs. Thompson, 39 An. 377.

Judgment affirmed.

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No. 11,291.

L. ROBIRA VS. NEW ORLEANS & CARROLLTON RAILROAD COMPANY.

An ordinance of the city of New Orleans stipulating in the grant or franchise of a street railway company to be operated on St. Charles avenue, between Canal street and Carrollton, as the terminii of its track, that it may charge to persons residing *below* Napoleon avenue a *double* fare from Canal street to Carrollton, while permitting persons who reside *above* Napoleon avenue to travel the whole distance for a *single* fare, is not subject to attack as an unreasonable discrimination prohibited by the law governing the obligations of common carriers.

APPEAL from the Civil District Court for the Parish of Orleans. *King, J.*

Thos. F. Maher and *Louis P. Paquet* for Plaintiff and Appellant.

John M. Bonner for Defendant and Appellee.

The opinion of the court was delivered by

WATKINS, J. This is an action for the recovery of damages alleged to have been sustained by the plaintiff by being illegally and wrongfully ejected from one of the cars of the defendant, at the intersection of St. Charles and Napoleon avenues, on the 24th of July, 1892.

When the defendant secured its franchise from the city government to run its cars through certain streets, an ordinance was passed which fixed and prescribed the rate of fare to be charged to all persons residing *below* Napoleon avenue at five cents from Canal street to Napoleon avenue, and five cents additional from Napoleon avenue to Carrollton; while the rate of fare for all persons residing *above* Napoleon avenue was only five cents from Canal street to Carrollton—the latter being privileged to purchase ten tickets for fifty cents.

As properly describing the tickets which were in use, and the operation of the city ordinance governing the same, we subjoin an extract from the brief of the defendant's counsel, viz.:

"In order, therefore, to carry into effect this provision of the ordinance, the company had printed on the same strip of paper ten tickets with corresponding coupons attached, and sold them to actual residents above Napoleon avenue for fifty cents.

"The tickets were numbered from one to ten consecutively, and each blue coupon had printed across its face: 'Good only to actual residents above Napoleon avenue,' and on a white strip at the bottom of the ticket was a printed notice that these tickets were to be used only by actual residents above Napoleon avenue—see tickets in envelope attached to transcript."

On the occasion referred to, the plaintiff went to the starter's stand, at the Baronne street end of the defendant company's line of railway, and purchased a bunch of such tickets as are above described. He then entered one of defendant's cars, accompanied by his wife and some friends, and paid the fare of the whole party as far as Napoleon avenue, detaching and placing in the fare box four of the red tickets described. However, the plaintiff was duly advised, while the car was on the stand, that he had no right to use those tickets, as he did not live above Napoleon avenue.

When the car reached Napoleon avenue, the collector entered and proceeded to collect the *second* fare of five cents due from that point to Carrollton, whereupon, being advised that the plaintiff and his party resided *below* Napoleon avenue, the collector attempted to detach four *red* tickets, but was prevented from doing so by the plaintiff, who insisted that *blue* coupons should be detached. This privilege being refused the collector, and the plaintiff declining to give any other than the blue coupons, he and his party were requested to leave the car, and did leave accordingly.

On this state of facts, the jury who tried the case rendered a verdict in favor of the defendant, and the plaintiff has appealed.

During the progress of the trial the judge charged the jury as follows, viz.:

"If you find from the evidence before you that the plaintiff lived below Napoleon avenue and obtained by purchase or otherwise, no matter how, if he obtained this bunch of tickets and attempted to use them on the cars of that railroad company, the company had a perfect legal right under the law of Louisiana not only to refuse to take those tickets, but to put him off the cars of the company. I charge you, gentlemen of the jury, further, that the tickets themselves were full notice to him of the contract."

This charge embodies substantially the defendant's contract right, as evidenced by the city ordinance, and appears to us to have been strictly correct, and is in keeping with the opinion of this court as

expressed in Forman vs. New Orleans & Carrollton Railroad Company, 40 An. 446, in which an almost exactly parallel case is stated.

Indeed, plaintiff's counsel recognizes the full force and applicability of that decision, if same is to be maintained, and proceeds to particularly anathematize the doctrine therein announced. But we are nevertheless constrained to uphold that decision, after a careful examination of it and the authorities upon which it is predicated, which are to the effect that the feature of the contract of defendant with the city which is complained of "is not subject to attack as an unreasonable discrimination, prohibited by the law governing the obligations of common carriers."

The Forman case was but the reannouncement of the principles decided in DeLucas vs. New Orleans & Carrollton Railroad Company, 38 An. 930. Vide Pickles vs. McLellan Dry Dock Company, 38 An. 412; Villavaso vs. Barthet, 39 An. 247.

It is our opinion that the judgment appealed from is correct and should be affirmed.

Judgment affirmed.

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No. 11,036.

ANTONIO AUGUSTI ET AL. VS. WIDOW AND HEIRS OF E. J. LAWLESS ET AL.

An assessment which does not contain a description sufficient to identify the property assessed is illegal and void, and, therefore, beyond the healing power of the curative statute of 1884—a sufficient description of the property being an indispensable prerequisite to the exercise of the taxing power.

There are certain requisites to a valid sale of property by a tax collector which can not be supplied or cured by subsequent legislation.

The object of a description is to enable the owner to ascertain from the list itself that the tax charged against him has been assessed upon his land and not upon that of a stranger.

APPEAL from the Civil District Court for the Parish of Orleans. *King, J.*

Robert J. Dugué and *W. S. Benedict* for Plaintiffs in Injunction and Appellees.

Wynne Rogers and *Bernard Titche* and *E. Howard McCaleb* for Defendants in Injunction and Appellants.

The opinion of the court was delivered by

WATKINS, J. When this case was last before us it was decided in favor of the defendants, but on the application of the plaintiff a rehearing was granted, and hence it is before us for a second consideration.

The pleadings and substantial facts are sufficiently recited in our opinion—10 Southern Reporter, p. 171—and only those that are pertinent to the question on which our opinion must turn require restatement.

In our opinion there was but one of the grounds of nullity of the sale alleged that was considered or dealt with, viz.: the nullity of the assessment, as will appear from the following extract:

"But among the grounds for the nullity of the sale it is averred that the property was not assessed in the name of the owner, and the assessment was illegal for want of certainty in the description of the property."

And the conclusion drawn from the evidence adduced was that "the plan of the property and the deed of the property to the defendants vary so radically from the description that it can not be identified either by numbers or by measurement. There was, in fact, no assessment of the property. This was essential to a valid sale under Act 82 of 1884 * * * There was no irregularity in the assessment which was cured by said act, because there was no assessment of the property."

It further appears from what was said in the opinion granting a rehearing that it was granted for the specific purpose of obtaining "fuller proof as to the facts concerning the assessment and description of the property;" and such being the terms of our decree our present examination and decree must be limited to those particular issues.

Referring to the plaintiffs' petition for rehearing we find it is distinctly grounded on the theory that they were completely taken by surprise by the finding of our opinion, to the effect that "as a fact there had been *no assessment* of the property at all"—they insisting that there was no such an issue in the case, and that the contention was only that there existed certain *irregularities* in an existing assessment; and for that reason they did not feel called upon to introduce proof of the *existence* of an assessment, and consequently made no such proof.

The further contention of counsel was that if the charge had been

made that there was *no assessment*, or had the *court below* ruled on that point, they could have defended themselves by producing the original assessment of the property in dispute—annexing to their motion a certified copy of the Lawless assessment for the year 1878.

Taking this petition in connection with our decree, and the conclusion is clear that the rehearing was granted and the cause remanded for the purpose of enabling the parties to introduce the assessment itself, or any other evidence they might possess in reference to its illegality *vel non;* and the parties seem to have viewed the remanding in this light, as the only proofs offered on the new trial were certified extracts from the assessment roll of 1878, including the assessment of Mrs. E. J. Lawless, and a certificate of research, from the office of the tax collector, showing in what manner assessments had been made in previous years. Taking the case in this situation, and we find the facts, in reference to the assessment, to be as follows, viz.: That on the roll of 1878 the property of Mrs. E. J. Lawless was thus assessed:

Name of Taxable Owner.	*Name of Street.*	*No. of Lot.*	*Measure.*	*Value.*
Mrs. E. J. Lawless	Canal.	26	22x114	
Mrs. E. J. Lawless	Canal.	27	41x114	$1600

The certificate of research shows that, by a slightly different description, same has been thus assessed since the year 1869.

To determine the legality of this assessment, and whether or not it is amenable to the complaint that is made of it in plaintiff's petition, it will be necessary to make a comparison of it with the description of the property in the tax title and the deed of Mrs. Lawless, as well as that contained in the advertisement of the tax sale.

The following is the description given of the property in the deed of Mrs. Lawless, which was evidenced by a notarial act, bearing date June 20, 1871, and duly recorded on the day following, and accompanied by an official plan by the city surveyor, viz.:

"Two lots of ground, with the improvements thereon, * * situated in the Second District of the city of New Orleans, in the square bounded by Canal, Customhouse, Rocheblave and Dorgenois streets, designated by the numbers 8 and 9, on a plan drawn by Pecquet & Campos, on the 22d of October, 1864, * * the lots adjoining each other and measuring each as follows: Lot. No. 9 has twenty-seven (27) feet front on Canal street by a depth of one hundred and fourteen (114) feet between parallel lines; and lot No. 8 has forty-one (41) feet and five (5) inches *front* on Canal street, with nine (9)

inches and seven (7) lines in *width* in the rear, by a depth of one hundred and fourteen (114) feet on the side adjoining lot No. 9, and of one hundred and twenty (120) feet eleven (11) inches and six (6) lines on the other side—(same) running obliquely toward Dorgenois street."

The tax deed contains this description, viz.:

"A certain lot of ground, with improvements thereon, situated in the second district of (the city) of New Orleans, in the square bounded by Canal, Customhouse, Rocheblave and Dorgenois streets, designated as *lot* No. 26, *or* 7 and 8, in square No. 331, said lot No. 26, or 7 and 8, measuring sixty-eight (68) feet front on Canal street by a depth of one hundred and fourteen (114) feet."

This description is preceded by an advertisement containing a similar description, while the plaintiff's petition follows the description contained in the Lawless title.

The striking and important defect that is apparent from a simple inspection of the original assessment that was introduced in evidence on the last trial is the erroneous designation of the property by municipal numbers—the numbers given being 26 and 27, instead of Nos. 8 and 9, as stated in the deed of Mrs. Lawless, the alleged tax debtor. It is quite evident that the description in the tax deed was intended to correct that error because it designates the municipal numbers as 26, *or* 7 and 8, in the alternative; but it is equally evident that it was unavailing for that purpose for the reason that a tax title must *yield* to the assessment and not control it. And just here the main and seriously controverted question recurs, How can the property of Mrs. Lawless be identified by the assessment as one and the same as that which was assessed, or how could the purchasers be put in the possession of *her* property, as that which had been adjudicated to them under that assessment and sale?

But, even if these questions be answered in the affirmative—though it is quite certain they can not—the description in the tax deed is insufficient, in terms, to convey more than one lot, because "*lot 26, or 7 and 8*," therein described, corresponds with *lot 8 of the Lawless title*, and entirely omits *lot 9 thereof*, though erroneously reciting its *front* measurement to be 68 feet, in lieu of the correct measurement of 41 feet and 5 inches on Canal street; and further erroneously reciting that it (lot 26, or 7 and 8) had a depth of 114 feet, whereas it has that depth *on one side only*, and is of only the

width of 9 inches and 7 lines in the rear—the lot having the shape of a triangle and not that of a trapezoid.

The conclusion at which we arrived when the case was last under consideration, to the effect that the "assessment was illegal for want of *certainty* in the description of the property," and upon which we rested our judgment to the effect that "there was no assessment of the property," has been accepted by plaintiffs' counsel as an issue—the only remaining issue in the case—and the second trial proceeded on that theory. This is attested by their brief, in which they request us to apply the doctrine announced in the Lake and Douglass cases in reference to the description of the property as affecting the validity of the assessment. They say:

"They are (1) that an exact and literal reproduction of the description of the owner's deed is not necessary, because a variance or irregularity in the description will not invalidate a sale, as the object and effect of Act 82 of 1884 were to validate tax sales, notwithstanding such variance or irregularity; (2) that whatever the irregularity might be in the words or figures of the description of the property, *if it be such that the property can be identified, no complaint regarding the sale could be made on account of the description.*" Brief, p. 9.

The paragraph counsel have selected from our opinion in the Douglass case is the following, viz.: "The only complaint is of certain irregularities in the assessment in non-compliance with the requirements of the law under which it was made. The fact remains that an assessment was actually made *by a description sufficient to identify the property, and not to mislead the owner, which is all that is required.*" (Our italics.) *In re* Douglass, 41 An. 765.

The accepted test of that decision, as well as of counsel's admission, seems to be that the assessment *must* be made by a description sufficient to identify the property and not mislead the owner, and that without such description the assessment is radically null and beyond the healing power of the act of 1884; or, in other words, the complaint of the assessment must not consist in a mere variance or rregularity in description, consisting of words or figures, not affecting the identification of the property.

In treating of this proposition we said in the Douglas case, "there are certain requirements absolutely essential to constitute a valid exercise of the taxing power, without which no tax sale could be

validly made"—stating among the chief indispensable prerequisites the assessment of the property.

Accepting this theory and referring to the map or plan that is contained in the original transcript, and which was doubtless copied from the one that is annexed to the deed of Mrs. Lawless, it is evident that there are, in the square designated, no such municipal numbers as 26 and 27, as employed in the assessment of the property of Mrs. E. J. Lawless, for the reason that the square bounded, as it is, by Canal, Customhouse, Rocheblave and Dorgenois streets contains but fourteen (14) lots, having an average front measurement on Canal street of 27 feet each, thus making the entire front measurement 372 feet; whereas, on the theory that there were twenty-seven (27) lots in this square fronting on Canal street, there would be twice that frontage on Canal street.

But this is not the greatest error in the description given in the assessment; it is that the description that is employed in the tax title —even accepting it as curing the error of description in the assessment, for the purpose of the illustration, it being No. 26 or 7 and 8 —when compared with the plan, indicates the property to be about the *middle* of the square, whereas, if there were really 27 lots instead of 14, the property would have, necessarily, to be on the *corner*.

It is thus completely and fully demonstrated that the description employed in the assessment is not only misleading but an impossible one, as under no circumstances could No. 26 be used convertibly for Nos. 7 and 8.

The case of Smith vs. City, 43 An. 726, is strictly applicable and not at variance with our opinion in this case, for the reason that the description which was in that case held to be sufficient gave the names of the streets bounding the square, designating its number, and also gave the *correct* municipal *number* of the lot, and the correct front measurement on Julia street, less a few inches.

Had the assessment of the Lawless property been as full and complete it would have been sustained as valid.

Hence our conclusion is that the assessment of the property in dispute as that of Mrs. E. J. Lawless was and is illegal and void, on account of the description of the property being insufficient to identify it—a sufficient description to identify the property and not mislead the owner being an *indispensable prerequisite to the exercise of the taxing power*.

As it appears to be conceded that the judgment appealed from was erroneously prepared and signed, as though rendered in favor of the defendants, whereas it was really and actually rendered in favor of the plaintiffs, it should for that reason be reversed, and it is so ordered, and proceeding to render such judgment as should have been rendered in the court below.

It is ordered and decreed that the tax sale under which the plaintiffs jointly claim title to the property in dispute be revoked and annulled; that the defendants' injunction be maintained and perpetuated without damages, and that the said defendants be quieted in their possession and enjoyment of the property as owners.

It is finally ordered and decreed that the plaintiffs, Antonio Augusti et al., be taxed with all the costs of both courts.

ON APPLICATION FOR A REHEARING.

BREAUX, J. The property involved in this controversy was bought by plaintiffs at tax sale under the provisions of Art. 82 of 1884.

They sued out a writ of seizure and possession.

In their petition for the writ, and to be placed in possession, the property was described as a certain lot of ground in the Second District of New Orleans, in the square bounded by Canal, Customhouse, Dorgenois and Rocheblave streets, designated as lot No. 26 or 7 and 8, in square 331. Said lot No. 26 or 7 and 8 measures 68 feet front on Canal street by a depth of 114 feet, formerly owned by the estate and heirs of Mrs. E. J. Lawless.

It was bought on 6th May, 1890, for the State taxes of 1878.

The deed of sale contained a recital that the property was assessed n the name of E. J. Lawless, but owned by the estate of Mrs. E. J. Lawless.

It was adjudicated for $5 to plaintiffs.

The advertisement under which the property was sold contains substantially the same description as that in plaintiffs' petition to be placed in possession.

Mr. Lawless never was the owner of lots designated as 26 or 7 or 8 in the square mentioned.

The street on which it fronts and the correct number were not given; the property was not identified.

The law under which the property was sold can not have the effect of dispensing with all the requirements or forms in matter of tax sales.

Confusing advertisements and misleading descriptions of the property are not cured by the operation of the act.

Something must appear of record toward establishing an accurate and pertinent description of the property embraced in the list in order to sustain the validity of the tax deed.

There are requisites to a valid sale of property by a tax collector which can not be supplied by subsequent legislation.

As an additional ground in support of their deed it is argued by plaintiffs that the defendants are estopped; that they have acquiesced in the description of the property on the assessment roll, and are therefore not in a position to contest plaintiffs' title.

It is a settled principle of the tax laws that minor irregularities may be cured by the party in interest.

This does not embrace a power on the part of a tutor to cure irregularities of moment in the enforcement of tax laws, nor will it enable the tutor by his payments of taxes to estop his wards when the irregularity is of such a character as to affect the power of the officer to sell.

Moreover, it is not shown that subsequent to the assessment of 1878 the tutor paid taxes on property as described in plaintiffs' tax deed.

Rehearing refused.

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No. 11,240.

IN RE CHARLES GENELLA, PRAYING TO BE PUT IN POSSESSION.

1. Where the issue between the parties to a suit is not the right of ownership, but the right of possession, and the value of the latter right is as to amount below the appellate jurisdiction of the Supreme Court, an appeal taken to that court will be dismissed *ex proprio motu*.

APPEAL from the Civil District Court for the Parish of Orleans. *Monroe, J.*

W. S. Benedict and *Robt. J. Dugué* for Defendant in Injunction and Appellant.

J. Zach. Spearing contra.

The opinion of the court was delivered by

NICHOLLS, C. J. Alleging that on the 25th of October, 1889, he had purchased from C. Harrison Parker, State Tax Collector of the First

District of the city of New Orleans, certain property in that district fully described in the act of sale of the same, passed before Lloyd Posey, notary public; that that property was worth more than two thousand dollars and that he desired to be placed in actual possession thereof, the plaintiff, Charles Genella, obtained an order from the judge of Division "C" of the Civil District Court that a writ of possession issue in his favor as prayed for. The application and order were based upon the provisions of Act No. 80 of 1888.

Before the writ was executed, one Frank A. Grunow filed a petition in which he alleged that he was the legal occupant and possessor for more than one year of a lot of ground in the First District of New Orleans, in square bounded by Melicerte, Magazine, Coliseum and Barthelemy streets, designated by the letter "B," in a plan by Joseph Pilie, April 26, 1883, deposited in the office of Felix DeArmas, notary in said city, which lot measures 81 feet 11 inches and two lines front on Coliseum street by 127 feet 10 inches and four lines deep between parallel lines, and which property was purchased by Miss Catherine Neidergang from Mrs. Henry L. Keely by act before H. B. Cenas, late notary, on the 27th of December, 1855, and registered in the recorder's office of New Orleans in book 69, folio 528: that, at the instance of Charles Genella, he has been served in these proceedings with a writ of possession ordering him to vacate said premises; that said Genella claims to have purchased said property from C. H. Parker, tax collector, under Act 80 of 1888, which allegation he specially denies. He avers that said property has never been assessed; that said property was never adjudicated to the State; that said property was never advertised for sale under Act No. 80 of 1888, or under any other act; that the adjudication to Genella was of lot 26 in said square, and that said Genella fraudulently had the description of above described property inserted in the deed to him, when said property was never advertised; that in the event the foregoing is overruled, and only in that event, and in the alternative, he alleges that in the alleged proceedings to enforce the payment of the alleged taxes for 1880 to 1883 on said property, under which proceedings it is claimed that said property was adjudicated to the State, the law in reference to the advertisement of said property was not complied with and said property was not advertised as required by law, and the State therefore has acquired no title to said property; that Catherine Neidergang was not the owner

of said property in 1880 or any subsequent year; that during 1880, or any subsequent year, there was no such person living as Catherine Niedergang or Neindergang, and that all alleged assessments and all advertisments in her name are absolute nullities and bind no one, and all proceedings under said name are absolute nullities.

That by Article 210 of the Constitution the State is forbidden to acquire property for taxes; that the alleged adjudication and sale of said property is nothing more or less than a forfeiture of said property after a mere advertisement thereof; that to constitute a sale there must be a seller and a buyer; that in said alleged adjudication the State appears as the seller, selling or adjudicating the property to itself; that such adjudication is in fact and in law a forfeiture of property, which is prohibited by said Art. 210: that *Act 77 of 1880* and *Act No. 96 of 1882*, in so far as the same provide for the adjudication of property to the State, is null and void, being in conflict with said Article 210, and all proceedings under said acts leading up to the alleged adjudication of property to the State are absolutely null and void. That there is no authority in the Constitution or in the laws passed in pursuance thereof providing for or authorizing a sale or adjudication to the State for taxes; that in the absence of a law authorizing an adjudication to the State the tax collector exceeded his powers in adjudicating said property to the State for taxes; that said property was not advertised the number of times required by nor under the provisions of said Act No. 80 of 1888; that said property was not advertised for thirty days as required by said Act 80 of 1888, and even without being advertised once a week. He further averred that the State is estopped from treating and from selling said property as property belonging to the State for the reason that the State has never assessed said property as State property according to law, but has treated said property as property belonging to individuals and not to the State, and has continued to assess said property from the date of the registry of the alleged sales to the State in the names of parties who claim to be owners thereof, and the State has charged and received taxes on said property under said assessments in the names of individuals for years subsequent to its alleged acquisition of said property.

He further averred that said property was not adjudicated to the State for the amount of the taxes, interests and costs claimed to be due only by said property. He prayed that a writ of injunction is-

sue restraining Genella and the civil sheriff from proceeding under the writ of possession and from interfering with him in the legal occupancy of said property; that Genella be cited, and that after due proceedings the injunction be perpetuated and that he (Grunow) be decreed to be the legal occupant and possessor of said property free from interference on the part of Genella.

A writ of injunction issued as prayed for; Genella filed an answer to the injunction, pleading the general issue, and further answering said he denied specially that any informalities or illegalities exist in any of the proceedings under and by virtue of which he acquired title to said property; that it is of a value exceeding $2000; that Grunow has been in possession thereof against the will of petitioner (Genella) by reason of his defences by injunction for a period of time exceeding two years; that the monthly rental value of said property was fully $20 a month, making a total of rents due petitioner by said Grunow and his sureties, together with $250 for counsel fees—he prayed that he be decreed the legal owner of the property and entitled to full possession thereof, with the rents and revenues therefrom, as against the said Grunow and his sureties, in the sum of $20 per month from the 26th October, 1889, until paid, with $250 counsel fees and all costs, and that the injunction be dissolved.

The case having gone to trial the District Court rendered a judgment in favor of plaintiff in injunction, perpetuating the injunction and recognizing and decreeing Grunow to be the legal occupant and possessor free from all interference on the part of Genella of the property described in the petition of injunction.

Genella has appealed.

The evidence shows that on the 27th December, 1855, *Miss Catherine Neidergang* purchased, by act before Cenas, notary, from Mrs. Sarah E. French, wife of Henry L. Keller, a certain lot of ground with all thebuildings and improvements thereon, situated in the First District of New Orleans, in the square bounded by Melicerte, Magazine, Coliseum and Barthelemy streets and designated by the letter "B" on a certain plan drawn by Joseph Pilie, surveyor, on the 26th day of April, 1833, and deposited in the office of Felix DeArmas, late a notary public in New Orleans, said lot measuring, in English measure, 31 feet 11 inches and 2 lines front on Coliseum street by 127 feet 10 inches and 4 lines in depth between parallel lines.

Miss Catherine Neidergang, subsequently to this purchase, removed to Switzerland, where in 1869 she married at Geneva one Joseph

Marie Jacquier. She died in Geneva on the 7th July, 1874, leaving no descendants nor ascendants. She left a will, which was probated in Geneva, but has never been presented for probate in Louisiana. In this will she declares that she bequeaths without reserve to her husband the furniture and in a word all the movable effects without exception and all that she possessed in Geneva. She bequeathed besides to her husband during his natural life "not only the usufruct but the administration (gestion) or control of all I possess in Louisiana, United States, to distribute it to him or them of my relations whom he will consider the most worthy."

Whether Mrs. Jacquier left collateral relations or not does not appear with certainty. There is no evidence that the husband has attempted to make a selection among them, if such there be, under the terms of the will.

The lot in question had been for some time prior to the present litigation, and was at its commencement, in the occupancy of Grunow, the plaintiff in injunction. It is admitted that he occupied the premises as the tenant of Joseph Jacquier at the rate of $5 per month and that one of the conditions of the lease is that he is not to be dispossessed except on six months' notice.

The plaintiff Genella claims, as we have seen, that the property in question is worth from $2200 to $2500; that Grunow has been in possession thereof against the will of the plaintiff by reason of his defences by injunction for a period of time exceeding (at the time of the filing of the answer) two years; that the monthly rental value of said property is fully $20, for which Grunow is liable, together with $250 counsel fees. The period for which Grunow holds a lease is not shown.

The issue between the parties hereto is not the right of ownership, but that of possession. The question of title could not be adjudicated upon in this case. See 15 An. 454, Young vs. Chamberlin, and Prescott vs. Payne, 44 An. 658.

The value of the right of property of a thing is entirely different from the value of the right of possession thereof.

The "matter in dispute" in the controversy before us is as to amount below our appellate jurisdiction. Harris vs. Stockett, 35 An. 387.

It is our duty to notice *ex proprio motu* want of jurisdiction *ratione materiæ*, and to dismiss the appeal. It is therefore ordered that the appeal herein be and the same is hereby dismissed.

Rehearing refused.

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No. 11,293.

WILLIAM HENRY BOTHICK AND MARY JANE BOTHICK VS. THOMAS W. BOTHICK ET ALS.

Where a man keeps house with a woman whom he calls his wife, introduces her into the community in which he lives as his wife, receives friends and relatives at his house as a married man and he and his wife visit them as man and wife, and he is generally known and respected as a married man and has children who are christened as the offspring of this cohabitation, taking his name and are reasonably looked upon as legitimate children, this cohabitation and relationship is presumptive evidence of marriage when there are no facts and no general or partial reputation in the community to show that the cohabitation is illicit. The abandonment of the reputed wife by the husband when such relationship exists is not proof of illicit cohabitation. His declarations that the children are illegitimate, made after the abandonment, and his last will, in which he ignores the reputed marriage, are not sufficient proof to rebut the presumption of marriage resulting from the oral testimony establishing such presumption.

APPEAL from the Civil District Court, Parish of Orleans.
Rightor, J.

J. S. & J. T. Whitaker and *Wm. T. Houston* for Plaintiffs and Appellees.

Frank L. Richardson, James McConnell, James Timony and *Henry P. Dart* for Defendants and Appellants.

The opinion of the court was delivered by

MCENERY, J. This suit was instituted for the purpose of establishing the legitimacy of plaintiffs as the children of Thos. W. Bothick, deceased, and of Catherine Connelly, also deceased, the alleged first wife of Bothick, and for the eventual recovery of their inheritance as the heirs of their deceased parents.

The District Court ruled out all testimony as to community rights and claims so far as it went to establish a money judgment, but permitted it in this connection to show that there was property in this State owned by the deceased Bothick, reserving to plaintiff the right thereafter to assert their claims upon said property, and in the succession of Bothick in the court having jurisdiction of the succession. The case was submitted to a jury and their inquiry was limited to the question of the legitimacy of plaintiffs—whether or not

Thos. W. Bothick was married to Catherine Connelly, and whether plaintiff was the issue of that marriage. The jury found a verdict in favor of plaintiffs, and a judgment in their favor was rendered thereon. The defendants appealed.

Pleas to the jurisdiction, *res judicata*, no cause of action, and estoppel were filed by defendants, each of which was overruled.

The defendants contend that after the exclusion of the money demand there was no amount in dispute to give jurisdiction. This objection is met by the allegation in the petition, and the evidence introduced thereunder to show that Bothick owned considerable property in the city of New Orleans, in which these children, if legitimate, may have an interest. The other pleas could more properly be argued in case plaintiffs pursued property in the hands of third persons, acquired at succession sale. On this point we express no opinion. It is certain that the plea of prescription can not be applied to the issue now pending, and it would be difficult to imagine a case in which the plea of estoppel could be argued to defeat a suit to establish legitimacy. Public policy favors claims of legitimacy, and we have said that where the conduct of the parties has been such as to create the presumption of marriage to the extent that it would yield only to proof, that there was no such marriage, a moral estoppel would intervene and forbid the falsifying of their acts and conduct by the parties. Blasini vs. Blasini, 30 An. 1398.

So far as the estoppel, the failure of plaintiffs to assert their rights in the suit for the settlement of the community in the marriage between Bothick and his second wife, née Cunningham, it will find its proper place with the other pleas in the assertion of rights claimed in that community interest, and on the property sold to settle it. On this point we also express no opinion.

There is no doubt that the plaintiffs are the children of Thomas W. Bothick and Catherine Connelly. Of this fact there is not the remotest circumstance to contradict it.

In the years 1846, 1847, 1848, 1849, Thomas W. Bothick lived in the city of New York, and in Newark, New Jersey. He came to New Orleans about the year 1849 or 1850, and while here married twice, the last wife surviving him.

From the time of his arrival here to the 24th of July, 1874, he lived with Ann J. Cunningham. She was universally recognized as his wife, and was undoubtedly married to him. She died in 1874, and afterward he married Olivia J. Bothick, who survives.

During his residence in New York City and in Newark, New Jersey, he lived with Catherine Connelly as his wife. No proof of an actual marriage exists, and the fact of the marriage rests on oral evidence to establish the presumption of its existence.

The testimony in favor of plaintiffs is sufficient to establish a conclusive presumption of the marriage of Thos. W. Bothick and Catherine Connelly.

They kept house together as man and wife in New York City, and Newark, New Jersey. They were known in these communities as man and wife and received friends and relatives as such. In New York they resided near the residence of Catherine Connelly's brothers, John and James, and visited them as man and wife. These brothers are spoken of as respectable. They are both dead. The testimony may be summed up in the evidence of John Stonier, the nephew of Thomas W. Bothick, who saw his uncle in New York City, in 1841, and subsequently in New Jersey, in 1846, 1847 and 1848. He did not know Catherine Connelly by this name, but knew her as "Aunt Bothick." Bothick and his aunt Bothick lived together as man and wife. He visited them in company with his mother, a sister of Thomas W. Bothick. They were treated and received as man and wife by his mother and his relatives generally, and he never knew anything to the contrary. All the testimony on behalf of plaintiffs is to this effect.

In fact, he was generally known as the husband of Catherine Connelly, and the testimony does not show that this relationship was ever doubted. There is not a fact adduced or a circumstance shown that would indicate that Catherine Connelly was the mistress of Thomas W. Bothick. Their children were baptized with the name of Bothick, and after he abandoned Catherine Connelly, in 1849, or 1850, she was always, in her semi-widowhood, recognized as the wife of Thomas W. Bothick. She was buried as his wife.

The plaintiff, W. H. Bothick, was brought to this city at an early age and taken into Thomas W. Bothick's family. His daughter, the co-plaintiff, resided in this city also and was introduced into his family as his daughter.

To negative this testimony, the defendants rely upon loose declarations in Bothick's second household, where W. H. Bothick, in family disturbances, was called a bastard. And on the declarations of a half sister that his father said he and his sister were illegitimate, but that his mother was a good woman.

And on the last testament of Bothick in which he referred only to his last two marriages, and made provisions for the children in each, ignoring the first set of children altogether. The loose declarations in fits of anger, in evident hostility to the plaintiff, W. H. Bothick, in the second household of his father, are entitled to little weight. And in reference to his reputed declaration of the illegitimacy of his children, to his daughter when on a visit to him, and the non-recognition of the children in the will, we think that a moral estoppel intervenes in favor of his children to prevent the denial of his acts and conduct. During the residence of the parties in New York and New Jersey they lived in the observance of all the obligations of marriage, and their acts and conduct were not compatible with any other theory than an actual marriage between them. Blasini vs. Blasini, 30 An. 1898.

The defendants rely upon the case of Powers vs. Executor, 35 An. 630. This case is in full accord with Blasini vs. Blasini, 30 An. 1388. In both cases the doctrine is announced that the evidence of cohabitation as man and wife must be general and consistent, not partial and circumscribed, and of such character as to authorize and invite the presumption that they were actually married with all the formalities required to constitute a valid marriage by the law of the place at which it is reported to have been celebrated.

In the case of Powers vs. Executor it was proved that the reputation of living together as man and wife was negatived by the acts of the parties, by the reputation of concubinage among friends and relatives.

In the case of McConnell vs. New Orleans, 15 An. 410, it was shown that Mary Ann Wall was reported to be the mistress of Pulley.

In the instant case there is, as stated, no testimony whatever that indicates that Thos. W. Bothick and Catherine Connelly occupied any other relation to each other than husband and wife when they cohabited together in New York and New Jersey.

The abandonment of the home by the husband is not sufficient to destroy this presumption, nor are his declarations, even if satisfactorily proved in this case, sufficient for this purpose after the abandonment.

We conclude that the plaintiffs are the legitimate children of Thos. W. Bothick and Catherine Connelly.

Judgment affirmed.

No. 11,304.

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MRS. CARMELITE LOUQUE VS. SUCCESSION OF MRS. B. SALOY AND HER HEIRS.

When property is held under conservatory writs on final judgment no damages can be claimed for the detention of the property under the writs.

When a suit is instituted by an administrator in good faith, without malice and with probable cause for the protection of a succession interest, and the administrator feels no damages can be claimed from the succession by the defendant for expenses incurred in defending the suit.

APPEAL from the Civil District Court for the Parish of Orleans. *Rightor, J.*

Chas. Louque for Plaintiff and Appellant.

Thomas J. Semmes for Defendants and Appellees.

1. No liability for libel for words pertinent to the issue contained in a petition filed in a suit. 43 An. 455.
2. No liability for damages resulting from the detention of property under an order of a court of justice. 108 E. C. L. 622, 623; 97 New York, 576.
3. In a suit for malicious prosecution, in order to recover there must coexist malice and want of probable cause; if there be no probable cause, yet if the defendant acted under an honest belief there can be no recovery. 9 R. 387; Queen's Bench R. for 1891, Vol. 2, p. 719; 40 An. 376; 41 An. 511.
4. There can be no malice when the jury are satisfied defendant acted under honest belief, although he did not make due inquiry. Q. B. for 1891, Vol. 2, p. 719.
5. The heirs are not liable for the torts of the administrator of a succession or of the attorney for absent heirs, both being public officers; their acts are their own official acts, not those of the heirs or their agents. 104 Mass. 94.

Drolla & Augustin on the same side.

The opinion of the court was delivered by

MCENERY, J. Mrs. Saloy died in the city of New Orleans. Her succession was fully administered and the effects turned over to the heirs. During her last illness she had in her possession, a short time before her death, a box containing money, bonds and jewelry. This box and contents were given to the plaintiff by Mrs. Saloy by manual gift, and she deposited the box in bank. The circumstances attending the gift induced the attorney for absent heirs to institute proceedings for the judicial sequestration of the box. The plaintiff in these proceedings refused to deliver the box and contents, and

asserted his ownership and legal possession of the same during the pendency of the conservatory writs provoked by the attorney for absent heirs in a rule taken on him. This rule was dismissed by plaintiff. In the conservatory proceedings instituted by this attorney, the judge ordered a judicial sequestration of the box and contents. From this order the plaintiff appealed. The judgment of the District Court was affirmed by this court. Succession Saloy, 43 An. 1158.

After the judicial sequestration of the box and contents, the administrators of the succession filed a suit against the plaintiff in behalf of the succession, for the ownership and possession of the same, on the ground that Mrs. Saloy had never parted with the ownership and possession of the box and contents, and had never made a manual gift of the same to the plaintiff. During the taking of the inventory, it is noted in the process verbal that said box and contents had been given to plaintiff, and the statements of the witnesses in whose presence it was given are set out in said inventory. On the trial of this suit there was judgment for the plaintiff herein, Mrs. Louque, declaring the donation valid and confirming her title to the box and contents. The succession representatives did not appeal from this judgment.

The plaintiff now brings this suit for damages on account of the proceedings instituted by the attorney for absent heirs and the suit instituted against her by the administrator of the succession.

The grounds of complaint are that the suits are libellous and that the inference drawn from the institution of the same was that Mrs. Louque had unlawfully abstracted the box and contents; that she suffered pecuniary loss for attorneys' fees in defending said suits, and that she lost the opportunity of investing her money by the long detention of said box and contents.

The answer is a general denial. There was a trial by jury and a verdict and judgment in behalf of defendants, from which plaintiff appealed.

1. There is no averment or statement in the petitions filed in the suit of the administrator against plaintiff and in the application of the attorney for absent heirs that can by any possible construction be construed into a libel of plaintiff's character, nor is there any innuendo that can be inferred from the allegations that would asperse the character of plaintiff. The petition and application are respectful and are in the usual forms. If the suit for the box

and contents created unfavorable impressions against plaintiff it was one of those unfortunate inferences that sometimes follow suits and accompany litigation for which the plaintiff, in the honest pursult of a right, is not responsible. The plaintiff in this suit was fully vindicated and the alleged unfavorable impressions were dissipated by the judgment in her behalf.

So far as damages are claimed for the institution of the proceedings by rule by the attorney for absent heirs, they are effectually barred by the judgment of this court affirming the judgment of the lower court in the case of the Succession of Saloy, 43 An. 1151.

In fact the issues presented in this suit are mainly disposed of in the opinion rendered by this court in that case.

In the opinion we said: "Under the terms of the order its only effort was to hold the box where it was until its contents were ascertained, and when the possessor prevented its opening, the box simply remained in the custody of the bank until further orders of the court. The effect in that case would have been simply that of a judicial sequestration, which we think in such a case would have been sufficient under Art. 273 of the Code of Practice, at least until the succession could be represented by the appointment of an administrator who could invoke the proper conservatory process to protect the interest of the succession."

The fact of the statement of witnesses to the donation appearing on the inventory did not determine the question of title or possession. It was still open to judicial inquiry and investigation.

That the administrator's duty was to continue the investigation instituted by the attorney for absent heirs was indicated in that portion of the opinion quoted. And the plaintiff herein also invited the suit instituted by the administrators.

The rule filed by Mrs. Louque, the plaintiff, on the attorney for absent heirs, tendered the issue of title to the box. In this sale the heirs of Saloy intervened and denied the title of Mrs. Louque to the box, and prayed for an order that the box be turned over to the succession of Saloy. She hastily discontinued this rule. There was, therefore, no alternative for the succession representatives but to bring the action against which this complaint is made.

They acted in good faith, without malice and with probable cause, in the institution of a suit for the protection of a succession entrusted to this administration.

Judgment affirmed.

No. 11,270.

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STATE EX REL. F. L. FERNANDEZ VS. CITY OF NEW ORLEANS.

It is the policy of the law to require of municipal corporations a strict observance of their powers.

A power can not be exercised where it is not clearly comprehended within the terms of the right sought to have recognized and enforced.

The judgments of the relator are restricted for payment to specific years. The restriction is part of the judgment, made so in express terms.

The council was without authority to vary from the terms of the judgment.

The judgments are restricted, in term, for payment to the years 1880, 1882, 1883, 1884, 1885, 1886 and 1889. Mandamus does not lie to compel payment from the revenues of 1893.

The writ of mandamus does not create a new authority.

Whatever rights the judgment creditor may have, can not be recovered in mandamus proceedings.

APPEAL from the Civil District Court for the Parish of Orleans. *Théard, J.*

Charles Louque for Relator and Appellant.

E. A. O'Sullivan, City Attorney, and *Horace L. Dufour*, Assistant City Attorney, for Respondent and Appellee:

1. Previous to 1879 there was no constitutional limitation of the rate of municipal taxation, and the city could be compelled to levy a tax and budget funds for the payment of judgments.
2. Since 1879 the rate of municipal taxation is limited, and can not be increased except to secure the obligations of antecedent contracts protected by the Federal Constitution. 32 An. 709, 884; 36 An. 56; 33 An. 79; 37 An. 18; 31 Fed. Rep. 537.
3. Courts will not interfere with the legislative discretion of the council in framing the budget of municipal expenses so long as constitutional or legal provisions and limitations are observed. Id.
4. Misappropriation of revenues or abuse of legislative discretion on the part of the council not having been alleged, can not be urged.
5. Under Act 30, extra session of 1877, intended to check municipal extravagance, the expenditures of each year can not exceed the revenues for that year, and payment of claims must be made exclusively out of the revenues of the year for which they are due. They do not constitute a debt due by the city, but by a particular fund. United States ex rel. Seigel vs. City, U. S. C. C.; Creole Company vs City, 39 An. 981; Paving Company vs. City, 43 An. 471.
6. Relator's judgments are by their terms and by law restricted exclusively for payment to the revenues of 1880, 1882, 1883, 1884, 1885, 1886 and 1889, and can not under any construction be paid out of the revenues of 1893.

The opinion of the court was delivered by

BREAUX, J. The relator sues by mandamus to compel the respondent to appropriate and set aside, an amount to pay his judg-

ments, amounting to $10,125.01, which were pronounced against the city of New Orleans.

They have been recorded in the office of the city comptroller in accordance with the provisions of Act No. 5 of 1870. The relator alleges that there are no funds to pay these judgments and no provision made in the budget of 1893 to pay them; and that under the provisions of the act of 1870, it is the duty of the council to annually budget for the payment of recorded judgments in the office of the comptroller.

The relator, concluding, prays for an order against the mayor and council of the city of New Orleans to compel them to make provision in the budget of 1893 for the payment of his judgments.

Respondent's return to the writ, substantially recites that relator's petition discloses no cause of action.

That the duties sought to be enforced are not ministerial, but involve the exercise of legislative and executive judgment and discretion, not enforceable by means of the writ of mandamus. That estimates and appropriations for the alimony and other expenses of the city of New Orleans are legislative functions with which courts will not interfere, and that in the exercise of these functions the council has appropriated the sum of $2000 for payment of the judgments recorded in the comptroller's office under the provisions of Act 5 of 1870, as the amount for the purpose, after paying the alimony and other expenses of the municipal government. That the judgments of the relator are restricted exclusively for payment to the resources of the years 1880, 1882, 1883, 1884, 1885 and 1889, and can not be legally budgeted for out of the resources of 1893.

From the judgment rejecting his demand the relator appeals. It is a fact that each judgment contains the order that it shall be paid out of the resources of particular years.

Municipal corporations have such powers as the general laws and their charters expressly confer upon them, and such as are necessary to exercise the power conferred.

Those who contract with them are aware of the limitations of their powers. They contract with reference to existing laws.

The Act of 1877, No. 30, provides:

"1. That no police jury of any parish nor any municipal corporation in this State shall make any appropriation of money for any year, which appropriation, separately or together with any other

appropriation or appropriations of the same year, shall be in excess of the actual revenue of said parish or municipal corporation of that year.

"2. That no police jury of any parish nor municipal corporation in this State shall approve any claim or make any expenditure which shall, separately or together with other claims approved or expenditures made, be in excess of the actual revenue of that year.

"3. That the revenues of the several parishes and municipal corporations of this State of each year shall be devoted to the expenditures of that year, provided that any surplus of said revenues may be applied to the payment of the indebtedness of former years."

The judgments relator seeks to collect are absolute in terms.

The City Charter, Act 20 of 1882, contains limitations and provides that the council shall once in twelve months, before deciding upon the amount of taxes and licenses, cause to be made out a detailed estimate of the various items of liability and expenditure, and after publication adopt it as a budget.

Prior to the act of 1870 judgments were executed against the city of New Orleans by the writ of *fieri facias*.

That act prohibited such a writ against the city, and substituted another method to enforce payment.

The writ of mandamus is the proper writ to compel the corporation to comply with its obligations. State ex rel. Carondelet Canal vs. Mayer et al., 30 An. 131.

The judgment is the basis upon which the writ issues and must be executed in accordance with its terms.

The legal right recoverable by mandamus is that expressed in the judgment. Judgment orders payment to be made from the revenues of specific years.

No misappropriation or diversion of funds are alleged.

Mandamus will not issue to compel the council to carry the judgment on the budget to be paid from the revenues of another year than that expressed in the judgment.

The court will refuse a mandamus if the right of the party applying therefor is not clear.

Manifestly, the right having been recognized in previous proceedings, can not be affected or changed by mandamus.

The council, in these proceedings, has no discretion on the face of the papers, enabling it to pay from other revenues than those mentioned in the judgment.

The only course left to the council was to conform strictly to the letter of the judgment. They were not authorized to vary from it, being officers with limited powers, acting under special laws.

In thus deciding we do not pass upon the validity of the judgment, or upon any of the rights the relator may have to recover in proceedings other than mandamus.

They remain unaffected, save that in these proceedings we will not grant a writ to pay from funds of a year different from the years specified.

The act must be clearly prescribed and enjoined by law. The duty must be plain and positive. State ex rel. Crawford vs. Mayer, 45 An. 278.

At the last session of the court at Shreveport, in State ex rel. Jones vs. Judge, 45 An., that principle of jurisprudence received further consideration.

The court reaffirmed the principle originally laid down in State ex rel. Pacific Railroad Co. vs. Nicholls, 30 An. 1217, in which the unanimous approval of the court render prominent the answer of the respondents: "We are public officers with limited powers, acting under a special law, not authorized to vary from it, or exercise any discretionary power in the matter."

In a recent treatise on the subject, Morrille on Mandamus, Sec. 50, p. 54, the principle is approvingly inserted in his text, and a number of authorities are cited in its support.

The judge of the District Court did not err in refusing the mandamus, and the judgment appealed from is therefore affirmed with costs, reserving to relator whatever rights he may have to exercise in other proceedings.

No. 11,306.

SUCCESSION OF FREDERICK GOOD.

The following testamentary disposition is a valid and lawful donation *mortis causa* of the usufruct of specified property to A for her lifetime, and of the naked ownership of the property to B's children, notwithstanding the inclusion of the words "the naked ownership shall revert," which are clearly shown by the context not to have served the testator in expressing his real purpose:

" I do give and bequeath after my death to A, the usufruct or life enjoyment of all my property, real, personal or mixed, which I may die possessed of, and my will is that after the death of A the naked ownership shall revert, and I do give and bequeath unto her nephew B, for the benefit of his six children, said property."

Succession of Good.

APPEAL from the Civil District Court for the Parish of Orleans. *King, J.*

Harry H. Hall for Plaintiff and Appellant.

W. R. Richardson and *E. T. Florance* for Defendants and Appellees.

The opinion of the court was delivered by

PARLANGE, J. The nephews and nieces of the decedent, claiming to be his legal heirs, have brought this action to have decedent's last will and testament declared null and void on the alleged ground that it contains prohibited trusts, substitutions and *fidei commissa*.

The disposing part of the will reads as follows:

"I do give and bequeath after my death, unto my said wife, the usufruct or life enjoyment of all my property, real, personal or mixed, which I may die possessed of, and my will is that after the death of my said wife the naked ownership shall revert, and I do give and bequeath unto her nephew, John W. Taylor, for the benefit of his six children, a resident of London, England, said property."

After trial, the lower court rendered judgment dismissing the action, and plaintiffs thereupon appealed.

We are first to ascertain the testator's intention, and then to determine whether that intention clashes with any provision of law.

The will evidences plainly an intention on the part of the testator to dispose by it of his whole property. He bequeaths to his wife the usufruct or life enjoyment of all his property. He gives her nothing beyond this. To John W. Taylor, his wife's nephew, for the benefit of his children, he bequeaths said property. By no reasonable inference can we reach the conclusion that the testator did not by the will dispose of the naked ownership during his wife's lifetime, to Taylor's children. He certainly did not bequeath the naked ownership to his wife during her lifetime, for the will is express as to what he bequeaths to her, to-wit: "The usufruct or life enjoyment." The will is clear as to his not bequeathing the naked ownership to his wife, and it contains no indication whatever of a desire to withhold the naked ownership from Taylor's children during the wife's

life. What object could he have had for so withholding it? On the contrary he says explicitly that he gives and bequeaths—not that he will give and bequeath—said property to Taylor's children, subject, of course, to the life usufruct he had just established in favor of his wife.

It is evident that the testator intended to and did bequeath the usufruct of the property to his wife for her lifetime, and the naked ownership, from the moment of his death, to Taylor's children. The words "and my will is that after the death of my said wife the naked ownership shall revert" in no manner impede us in reaching the above conclusion. They were evidently used by the testator without a full import of their meaning, and it is plain that they do not serve him, as he intended that they should, to further express the purpose which the context shows him to have had.

The intention of the testator is clear and his purpose was lawful. The will is valid. 4 Rob. 409, 3 An. 144, 10 An. 28 and 352, 3 An. 406, 38 An. 510, 44 An. 591.

It is therefore ordered that the judgment appealed from be and the same is hereby affirmed at appellants' costs.

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s111 204

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No. 11,313.

LOUISIANA SOCIETY FOR THE PREVENTION OF CRUELTY TO CHILDREN VS. HUGH C. CAGE.

1. Where a bail bond is forfeited under Section 1032, R S., and an appeal is taken from the forfeiture to this court, it is settled that this court has jurisdiction regardless of the amount of the bail bond, if the same was given in a criminal prosecution within the jurisdictional power of this court; the doctrine being that in such a case the matter of the forfeiture is attracted to the criminal prosecution.
2. But the doctrine does not apply to a bail bond given before a recorder of the parish of Orleans for appearance at a preliminary examination before him; such a bail bond not being within the purview of Section 1032, R. S., which applies to the forfeiture of bail bonds for appearances before District Courts having criminal jurisdiction
3. A bail bond for the appearance of an accused at a preliminary examination before a recorder of the parish of Orleans creates a lawful and binding obligation and such a bail bond may be sued upon by a civil action in the Civil District Court for the parish of Orleans. But where the amount of such a bail bond is only $500, this court has no jurisdiction on appeal.

APPEAL from the Civil District Court for the Parish of Orleans.
Monroe, J.

F. Rivers Richardson and *W. S. Parkerson* for Plaintiff and Appellant.

Clegg & Thorpe for Defendant and Appellee.

The opinion of the court was delivered by

PARLANGE, J. This is an appeal from the judgment of the Civil District Court for the parish of Orleans dismissing, on the ground of want of jurisdiction *ratione materiæ*, a suit brought by the Louisiana Society for the Prevention of Cruelty to Children against the surety on a bail bond for $500 furnished by a person charged with crime, to insure his appearance for preliminary examination in the Second Recorder's Court for the parish of Orleans. The accused failed to appear as he had bound himself to do and the aforenamed society brought suit on the bond in said Civil District Court, alleging the right so to do under Act 32 of 1892. As to this right we are not called upon to express an opinion. The defendant excepted in the Civil District Court that the matter of the suit is criminal and not civil and that therefore the Civil District Court had no jurisdiction. The exception was sustained.

In England, recognizances and bail bonds were estreated from the criminal courts and removed into the exchequer. That the king might also maintain an action of debt seems to be plain.

The right of committing magistrates is clear in proper cases, and under proper circumstances, to admit to bail pending preliminary examination persons, charged with crime. It is difficult to conceive of a reason why the State can not sue for the amount of a bond given in such cases when the condition of the same has been violated.

The act of April 2, 1832, allowed District Courts to take certain proceedings with regard to bail bonds and recognizances, which this court held did not decree an absolute forfeiture, but operated similarly "to what is known in the common law under the term estreat, which signifies extracted from the records of the criminal court to serve as a foundation against the accused and his surety for a *scire facias*." 10 La. 102.

The act of March 11, 1837, re-enacted in 1855, and now Sec. 1032, R. S., allows District Courts having criminal jurisdiction to forthwith

enter up judgment on a bail bond or recognizance when the principal, on call made, fails to appear.

In a number of cases this court has held that when a judgment is entered up on a bail bond under Sec. 1032, R. S., an appeal from that judgment may be taken to this court regardless of the amount of the bond, if the same was given in a criminal prosecution within the jurisdictional powers of this court, because the matter of the bond is attracted to the criminal prosecution. This doctrine is clear and has been settled by repeated adjudications.

But the doctrine does not and can not apply to a bail bond taken by a recorder of the parish of Orleans for the appearance before himself of a person charged with crime, for the manifest reason that there is no legislation, as in the case of Districts Courts with criminal jurisdiction, conferring upon a recorder the power to enter up judgment on a bail bond. Therefore the law as to bail bonds taken by recorders for appearances before them is exactly what it was as to all the courts possessed of criminal jurisdiction, prior to the legislation which empowered District Courts having criminal jurisdiction, to deal with bail bonds returnable before them. It surely can not be contended that prior to such legislation the State was powerless to collect the amounts of bail bonds returnable before committing magistrates, when the conditions of the bonds were violated. If the State could then do so, did the conferring by the subsequent legislation of power to District Courts having criminal jurisdiction, to deal with the bail bonds returnable before them, destroy or impair the right of the State to enforce bail bonds taken by the criminal courts inferior to the District Courts? Clearly not.

In the case of State vs. Ozer, 5 An. 744, cited 42 An. 1094, this court held through Mr. Justice Preston as its organ, that a justice of the peace had the power to admit to bail during the pendency of a preliminary examination and that an ordinary suit on bail bond could be maintained. The defendant in that case urged that the justice of the peace had no power to proceed upon the bond in the summary manner provided by the acts of 1835 and 1837, and this court said:

"In this they are certainly right, and it was that which rendered the present suit before the District Court necessary to enforce the penalty of the bond. But it is further intimated that the summary mode of proceeding prescribed by those acts should have been pursued in this case in the District Court. In this they err, because

those laws expressly limit that remedy to bonds, recognizances and other obligations made returnable before the District Court, which was not the case with the bond sued upon. It was returnable before the justice himself, and we know of no remedy for the State to enforce its penalty but that which has been pursued by the district attorney by bringing an ordinary suit before a court of general jurisdiction."

In the case of Cassidy, 7 An. 276, which was a suit on a bail bond for appearance in a criminal case before the First District Court of New Orleans, it was urged "that the obligation of the surety was a civil one only and must be enforced according to the rules prescribed for civil actions."

This court said, also through Mr. Justice Preston: "The forfeiture of the bond by judgment has always been considered as a criminal proceeding, *and whether criminal or civil, was obtained in this case in the mode pointed out by the act of 11th of March, 1837, passed expressly for that purpose.*" (Italics are ours.)

These two cases just cited, rendered by the same organ, far from being in conflict with one another, show the distinction between bail bonds forfeited under the act of 1837 (Sec. 1032, R. S.), which are attracted to the criminal prosecutions in which they are forfeited, and bail bonds which are not within the purview of the act of 1837.

As showing the intrinsic civil nature of a bail bond, we may cite the case of Norment et al., 12 La. 511, in which this court held that notwithstanding the summary proceeding concerning bail bonds, provided by the act of 1835, the district attorney might bring an ordinary action.

In Commonwealth vs. Green, 12 Mass. 1, it was held that the commonwealth might maintain an action of debt, though *scire facias* was provided by statute. In State vs. Hendricks, 40 An. 722, this court, speaking of the forfeiture of a bail bond, said: "Intrinsically, the proceeding may be viewed as civil in character. It is based on a contract under private signature, on which a money judgment can be rendered which may be executed on the issuance of a *fi fa.* It is not a proceeding for the recovery of a fine inflicted for the commission of an offence." This court added: "In so saying we do not lose sight of the fact that it has been treated as a criminal proceeding in order to determine questions of jurisdiction in cases of appeals from judgments of forfeiture of bail bonds." This refers, of course,

to bail bonds forfeited under Sec. 1032, R. S., which, as already shown, come to us on appeal by virtue of the appealable character of the criminal prosecution to which they are attracted under that statute. But the bond in the instant case is not of that character, and is not within the purview of that statute.

Other decisions of this court as to the civil nature of a bail bond might be cited.

We are clear that this suit is a civil one, which the Civil District Court had jurisdiction to hear and determine. But for that very reason it is evident that this court has no jurisdiction of the appeal, which involves only $500.

It is therefore ordered that the appeal herein be and the same is hereby dismissed at appellant's costs.

Rehearing refused.

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No. 11,276.

FERDINAND KUHNHOLZ VS. CITY OF NEW ORLEANS.

Where the judge of the lower court fails to pass upon the issue actually before him, and passes upon one not raised by the pleadings and evidence, the judgment will be annulled and the case will be remanded.

APPEAL from the First City Court of New Orleans.
Childress, J.

Jos. D. Séguin for Plaintiff and Appellee.

Geo. W. Flynn, Assistant City Attorney, and *E. A. O'Sullivan*, City Attorney, for Defendant and Appellant.

The opinion of the court was delivered by

NICHOLLS, C. J. Plaintiff alleging that he was engaged in the city of New Orleans in the business of the manufacture of stationery, blank books, books, book binding and the like, and employed in his manufactory a force of not less than five hands; that under the Constitution he was, as such manufacturer, exempt from property tax upon the capital, machinery and all other property employed by him in his business; that despite the fact of such exemption the city of

New Orleans, through its Board of Assessors, had assessed and was, through its treasurer and *ex-officio* tax collector, attempting to collect a property tax of the sum of $53.35, interest and costs included, for the year 1892 upon the property employed by him in his said business, and that the city of New Orleans, through a deputy tax collector, unknown to him, had actually entered upon his business premises and attempted to seize and take charge of the said property, and had given him a notice that it would after a certain delay advertise and sell the property to pay said tax (which notice he annexed and made it part of his petition), obtained an injunction directed to the city of New Orleans and its treasurer, *ex-officio* tax collector, restraining and prohibiting them from collecting said tax. He prayed that the said parties be cited to appear and answer his demand; that after due proceedings there be judgment declaring the said assessment of said tax and said tax to be unconstitutional, null, void and of no effect, and that the injunction taken out be perpetuated.

The city answered by denying generally all the allegations of the petition and by specially denying that plaintiff was exempt from the payment of personal taxes under Arts. 206 and 207 of the Constitution. It averred that the business of plaintiff was not such as contemplated by the constitutional exemption, but on the contrary was such as was required to pay both personal and license tax.

On trial judgment was rendered in favor of the plaintiff, decreeing the assessment of 1892 on machinery employed in plaintiff's business to be null and void and of no effect, and ordering that the same be canceled and erased.

The city moved for a new trial on the grounds—

1. "That the judgment is contrary to the law and the evidence."

2. "That Articles 206 and 207 of the Constitution can not be so construed to apply to the business of a bookbinder, which is simply the putting of merchantable material together in such a shape as to meet the ordinary wants of trade; that the books prepared for sale by plaintiff are not manufactured from the raw material, nor from any article manufactured or prepared by the plaintiff."

3. "That under no construction of the law can the exemption from a license tax be applied to plaintiff's case, and to that extent the judgment was unquestionably erroneous and illegal."

A new trial having been refused by the court the city of New Orleans appealed.

The judge of the City Court committed two errors in this case. The assessment against the plaintiff's property, as shown by the *notice annexed to plaintiff's petition*, was only upon *merchandise, or stock in trade.* The issue raised by the pleadings and evidence was whether this merchandise was part of "the capital, machinery and other property employed in the manufacture of stationery," and as such exempt from taxation under Artic'e 207 of the Constitution. The city judge failed to pass upon the actual issue and decided one which was not before him at all. No assessment seems to have been made of the plaintiff's machinery, and yet the only judgment rendered was one decreeing the assessment upon the machines to be null and void and of no effect, and directing its cancellation. The plaintiff neither appealed nor made a motion for an amendment of the judgment. There being no assessment of machinery upon which the judgment can be made to operate, it must be reversed.

For the reasons herein assigned, it is ordered, adjudged and decreed that the judgment appealed from be annulled, avoided and reversed, and the case is remanded to the lower court for further proceedings according to law.

No. 11,277.

FERDINAND KUHNHOLZ VS. CITY OF NEW ORLEANS.

Where the judge of the lower court fails to pass upon the issue actually before him and passes upon one not raised by the pleadings and evidence, the judgment will be annulled and the case remanded.

APPEAL from the First City Court of New Orleans.
Childress, J.

Jas. D. Séguin for Plaintiff and Appellee.

Geo. W. Flynn, Assistant City Attorney, and *E. A. O'Sullivan*, City Attorney, for Defendant.

The opinion of the court was delivered by

NICHOLLS, C. J. This case presents the same issues as those in that of Ferdinand Kuhnholz vs. City of New Orleans, decided this

day—differing simply as to the year in which the assessment complained of was made, and the amount of the tax. It seems to have been consolidated and tried with that case, but was brought up by separate appeal and on different transcript.

The city judge *a quo* committed the same error in this as he did in the other case in passing upon an issue not before him, and failing to pass upon the actual issue presented by the pleadings and the evidence. Plaintiff has neither appealed from the judgment nor asked for an amendment.

For the reasons assigned in the other case (No. 11,276), it is ordered, adjudged and decreed that the judgment appealed from be and the same is hereby annulled, avoided and reversed, and it is ordered that the case be remanded to the lower court for further proceedings according to law.

No. 11,303.

WALTER P. SCOTT VS. JOHN G. MOLL.

Claim being made for damages resting upon an alleged tort, and the proof disclosing that they grew out of an illegal provisional seizure of the plaintiff's property, as that of a corporation of which he was a shareholder, director and vice president, and of which corporation he had previously become a sub-tenant of the defendant's property—*held*, that the purposes of justice will be best subserved by the affirmance of a judgment for nominal damages in favor of the plaintiff.

APPEAL from the Civil District Court for the Parish of Orleans. *Théard, J.*

O. N. Ogden and *R. W. Knickerbocker* for Plaintiff and Appellee:

Damages granted by the court for the illegal seizure of plaintiff's property after notice to the seizing creditor. 34 An. 58.

Damages actually sustained comprise not only pecuniary loss and actual expense incurred, such as costs and counsel fees, but also the mortification, annoyance and vexation caused to the defendant by the attachment. M. L. Byrne & Co. vs. L. W. Gardner & Co., 33 An. 6.

Substantial reparation afforded where the conduct of defendant was insulting and aggravating, and well calculated to wound and incense. MacFarland & Dupre vs. Lehman, Abraham & Co., 38 An. 351.

Malice inferred from want of probable cause. 33 An. 776.

Malice in law is not necessarily personal hate, or ill will of the trespasser against the person injured, *but it is* that state of mind which is reckless of law and of the *legal* rights of the citizen; and the object of exemplary damages is *not* only to indemnify the sufferer for any loss sustained, but to prevent similar actions on the part of trespassers in the future. American Digest, Vol. 1 326, *Verbo* Damages.

L. De Poorter for Defendant and Appellant:

1. To recover damages *ex delicto* the proof must be specific; plaintiff must make his case certain; to make it probable is not enough. Vagueness and uncertainty, which only lead to inferences, are not sufficient. 16 An. 121, 151; 15 An. 268; 18 An. 29, 116; 19 An. 121; 22 An. 378; 40 An. 109.
2. One who by silence, when it was his duty to speak, decoys another into particular conduct, can enforce no advantage thereby acquired. 5 An. 108; 10 An. 585; 4 An. 293.
3. Where under execution against a third person the latter's supposed interest in plaintiff's store has been seized, though illegally, yet on probable cause and without malice, plaintiff can recover no damages. 14 An. 327; 7 An. 336.
4. In absence of malice no vindictive damages will be allowed. 18 An. 214; 33 An. 372.

The opinion of the court was delivered by

WATKINS, J. This is an action in damages alleged to have resulted from an illegal seizure of property of the plaintiff under a writ of provisional seizure for rent defendant claimed of the Knerr O'Brien Cotton Seed Linting and Cleaning Company as his lessee—plaintiff alleging that said seizure was an oppressive and unwarranted trespass upon his property and premises; and that same was accompanied by a criminal arrest of one of his employés at the instance of the defendant.

The cause was tried by the judge, who rendered judgment in favor of the plaintiff for the sum of $350, and the defendant has appealed. In this court the plaintiff and appellee has answered the appeal and claimed an increased allowance corresponding to the prayer of his petition.

It seems that in October, 1891, the defendant leased to the linting and cleaning company for one year, the properties and premises known as No. 62 Lafayette street, and Nos. 84 and 86 Tchoupitoulas street, in the city of New Orleans—the plaintiff being the owner of a ginnery, transported same to No. 86 Tchoupitoulas street for the convenient use of the company.

On May 30, 1892, the defendant caused a writ of provisional seizure to issue against the company for an unpaid instalment of rent, and thereunder to be seized all of the aforesaid machinery, as well as other property.

In August, 1892, the plaintiff filed an intervention in the suit of the defendant, against the company, setting up his claim of ownership of the ginnery, fixtures and machinery, and the non-liability to

seizure of same; and the court wherein that issue was tried held same not liable to seizure, and ordered and decreed the release of same from seizure; and further held and decided that he was the company's sublessee of the leased premises of the defendant.

That judgment was not appealed from, and is therefore *res judicata*, and determines the plaintiff's right of action for damages, if any he has suffered.

But the plaintiff's demand does not *exclusively* rest upon the illegal provisional seizure of his property antecedent to judgment, for his averment and prayer are to the effect that the defendant, in utter disregard of said judgment, immediately after its rendition commenced a systematic plan of operations whereby he was to be ousted and dispossessed of the leased premises before the termination of his lease. And the plaintiff charges—employing the language of his counsel's brief—that the defendant, in "utter contempt of the decision of the court, made demands upon Scott for immediate vacation of the premises, and finally, inflamed by Scott's resolute maintenance of his rights under his lease and under the judgment, resolved to take the law into his own hands, at least to the extent of invading the plaintiff's premises and violently interfering with his affairs. The trespass was the more offensive as it actually proceeded to the criminal arrest of Scott's engineer, who was compelled to abandon the running of the engine—fired to perform the work of his employer."

Per contra, the contention of defendant's counsel is that "during the month of September the insurance inspector visited the buildings of Moll and reported that the firing of the boiler of Scott in 86 Tchoupitoulas, the furnace end of which had been extended into No. 84 Tchoupitoulas street through the wall (a building which was not subleased by Scott), was dangerous to the buildings. Moll was notified that if fire was lighted under said boiler the insurance on his buildings would be canceled; and in fact one or two policies were thrown up by the companies.

"Moll then informed Scott of this fact, and told him he would not be allowed to make any more fires in said boiler.

"On the 27th of September, 1892, a few days before the expiration of the term of the lease of the Knerr O'Brien Company, Scott, notwithstanding the warning of Moll, did fire up his boiler. Upon this, Moll interfered and prevented the act—upon which the boiler was

blowed out for the purpose of being removed to new quarters, No. 60, leased by Scott from another person.

"The Knerr O'Brien Company had placed the boiler to run their machinery, in No. 60, leased by it from another, and not from Moll, the specific condition in their lease from Moll being that said corporation would place nothing in the Moll buildings which would forfeit the insurance." Pages 3 and 4 of defendant's brief.

While claim is made in plaintiff's petition for $500 for the vexatious seizure of his property; $2000 for the loss of profits of his business on that account, and $2500 vindictive damages—aggregating the $5000 demanded in his answer to the defendant's appeal—yet in his brief, plaintiff's counsel states that "the damages claimed are those to which he is entitled for the *tort* for the actual substantial losses sustained in his business."

His argument is, that while the rule may be, in suits for damages for the inexecution of contracts, that only direct losses which the parties might have contemplated are recoverable, yet in suits for damages arising from torts, a different rule of admeasurement obtains—and this latter rule he seeks to have applied.

He insists that the facts of this case clearly entitle him to *substantial* damages—the judgment having awarded nominal damages.

With regard to the tortious acts and conduct of the defendant, after the seizure had been released, the plaintiff, as a witness, says:

"Before moving from the premises No. 86 Tchoupitoulas street, in the course of business I had accumulated between twenty and thirty bales of cotton in the shed, making quite a bulky arrangement, and before moving I proposed to give that out to meet the obligations I had incurred in paying for this seed cotton; and on the 29th day of September Mr. Moll resisted my manager's efforts to do the proper thing in regard to closing up the affairs in that place, preparatory to moving out on the 1st of October, when the lease was up."

Again: "I was prevented from exercising these privileges, which required *steam*, and for which I was fully prepared, by Mr. Moll's violent action in regard to bringing a policeman there to arrest my agent and prevent his doing anything; and I could not do anything without my agent being there."

This selection is made from the evidence of the plaintiff as typical of all the evidence in the case, and as illustrative of the character and

extent of the damages he suffered at the defendant's hands; and giving to it the consideration most favorable to his theory, we are disinclined to increase the allowance in his favor. True it is that plaintiff's goods and effects were illegally seized for the indebtedness of the Knerr O'Brien Company, and he was necessitated to institute judicial proceedings for the procurement of their release; yet plaintiff was a shareholder in that corporation, and also vice president and a director.

He was at the same time a sublessee of the company, of the defendant's premises, and after the provisional seizure of its effects he accepted appointment as keeper, and in that capacity had superintendence and control of the property and effects—including those he subsequently claimed and recovered as his own.

In so far as the tortious acts of the defendant, *after the seizure had been released*, are concerned, his interference took place only *three* days prior to the expiration of his lease; and upon the plaintiff's own showing could not have resulted in serious damage.

On the whole we are of opinion that the purposes of justice would be subserved by an affirmance of the judgment.

Judgment affirmed.

Rehearing refused.

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No. 11,307.

THE STATE OF LOUISIANA VS. HENRY LOCHTE.

1. A municipal corporation, which is a creation of the law and a state functionary, can exercise only those powers which have been expressly delegated to it, and those which are necessarily implied as inherent to its existence and thus absolutely indispensable for administration and maintenance in the accomplishment of the functions for which it was put in being and given life.
2. A municipal corporation has no right to enforce ordinances which it has the power to pass, by fine and imprisonment, or other penalty, unless that right has been unquestionably conferred by the law-giver.
3. The words of the city charter, which provide for the punishment of any violations of city ordinances by fine or imprisonment, refer to ordinances which the common council is authorized, in terms, to pass and have executed in reference to the preservation of the peace and good order of the city, and the maintenance of its cleanliness and health; and they also extend to and embrace the ordinances and regulations the common council is authorized to pass with reference to obstructions in the public streets or alleys of the city—same being a necessary police regulation.

4. Natchez alley, though not a street *eo nomine*, is a *locus publicus* dedicated to public use, and comes within the terms of the statute and the ordinance.
5. A proceeding of this kind is of a *quasi* criminal character, and in no sense a civil suit involving title to property.

APPEAL from the First Recorder's Court of the City of New Orleans. *Whitaker, J.*

E. A. O'Sullivan, City Attorney, for Plaintiff and Appellee.

E. N. Whittemore for Defendant and Appellant.

The opinion of the court was delivered by

WATKINS, J. The defendant is appellant from a sentence and judgment pronounced against him in the recorder's court, condemning him to pay a fine of twenty-five ($25) dollars, or be imprisoned in the police jail for a term of thirty (30) days, for the violation of city ordinance No. 4797, A. S., prohibiting the obstructing of the streets and public thoroughfares thereof.

The defendant appeared and moved the court to quash and dismiss the prosecution against him on the following grounds, viz.:

1. That said ordinance is unconstitutional and illegal, and deprives him of his property without due process of law, without compensation or indemnity; and violates the Constitution and laws of the United States and of this State—and, more particularly, the fourth, fifth and fourteenth amendments to the United States Constitution, Arts. 1, 2, 6, 155 and 156 of the Constitution of this State, and Art. 497 of the Civil Code.

2. That the recorder's court is without jurisdiction under Art. 92 of the State Constitution to try this case, which is an attempt by the city, under color of said ordinance, to deprive him of his property.

3. That the defendant did not violate said ordinance, in point of fact, as stated in the affidavit, to which he pleads a general denial.

He then sets out the following defence, viz.: That the space pretended, in said affidavit, to have been obstructed, was and is the *private* property of the defendant, as more fully appears by the acts of sale, and surveyor's certificates annexed and made part of his answer. That he and his predecessors have long paid State and

city taxes on said space, which forms part of his premises as described in said deeds and certificates.

This motion to quash was overruled by the recorder for reasons assigned orally, and not appearing of record; and thereupon the trial was proceeded with, a large amount of testimony taken, and judgment was thereon rendered against the defendant.

Ordinance No. 4797, A. S., relates to the obstruction of streets, gutters, banquettes and other public places; and it provides that "it shall be unlawful for any person or persons to encumber or obstruct any of the streets, gutters, public roads, public grounds, public squares, public places or promenades, banquettes or sidewalks of the city, by depositing in or on the same any box, bale, hogshead, barrel, or any goods, wares or merchandise, or any article whatsoever, except for the necessary time for loading and unloading the same;" then follows the formula of proceeding, and the penalty attaching to violations thereof.

The affidavit made under this ordinance complains that the defendant did, on the 9th of May, 1893, on Natchez alley, corner of Tchoupitoulas street, in the city of New Orleans, violate its provisions "by obstructing the thoroughfare."

The defendant's counsel, in oral argument and in brief, urges the following grounds of defence, on which he relies—as arising under the pleas set up in his answer, to-wit:

1. That the city ordinance does not conform to the city charter (Sec. 7, Act 20 of 1882), which authorizes the common council "to open and keep open and free from obstruction all streets, public squares, wharves, landings, lake shore and river and canal banks," because "Natchez alley does not come under the above description."

2. Assuming that the city has power to pass said ordinance, yet it had no right to undertake to enforce such ordinance by fine, and, in default of payment, by imprisonment—because there is no such delegation of authority in the city charter.

3. That the space that is alleged to have been obstructed was and is *private* property of the defendant, and that the recorder's court is without jurisdiction under the Constitution, because the proceeding was virtually an attempt to deprive the defendant of his property without due process of law.

An examination of the city charter discloses that the common council possesses the power, and has imposed upon it the duty, "to

pass such ordinances and *see to their faithful execution* as may be necessary and proper," for the various purposes and objects afterward enumerated; and amongst those enumerated are the following, to-wit: to maintain the cleanliness and health of the city, and to this end, among other things, "to adopt all such ordinances and regulations as shall be necessary and expedient."

It confers upon the common council power, and makes it their duty, to provide "that all premises, yards, streets and alleys shall be kept in a cleanly condition;" and also to "provide for the punishment of any violation of such ordinances or regulations by fine or imprisonment, or both." This paragraph is immediately followed by another in the same sentence, which declares it to be the duty of the council to "open and keep open and free from obstruction all streets, public squares, wharves, landings, lake shore, and river and canal banks;" and while the General Assembly did not find occasion to repeat or reiterate the delegation of authority to pass all such ordinances as might be necessary for the enforcement of same by fine or imprisonment, it is clearly and easily inferable from the text and context, when construed together, that such was the legislative purpose and intent.

The case of State vs. Bright, 38 An. 1, so confidently relied upon by defendant's counsel, is not applicable, because it involved the question of the power of the city to enforce, by fine and imprisonment, compliance with the requirements of an ordinance relative to the establishment of an uniform grade for all sidewalks within the corporate limits—a question altogether different from the one before us, and controlled by different provisions of the charter.

But the principle of law announced, as controlling the opinion of the court, is strictly correct and equally applicable to the instant case.

"It is a principle," says the court, "that a municipal corporation, which is a creation of the law and a State functionary, can exercise only those powers which have been expressly delegated to it, and (those) which are necessarily implied as inherent to its existence, and thus absolutely indispensable for its administration and maintenance in the accomplishment of the functions for which it was put in being and given life.

"It is therefore acknowledged by text writers, supported by abundant authorities, that a municipal corporation has no right to

enforce ordinances which it has the power to pass, by fine and imprisonment or other penalty, unless that right has been unquestionably conferred by the law-giver; for this is inflicting a punishment for the commission or omission of an act declared an offence, a prerogative which, as a rule, appertains to the sovereign alone"—citing Dillon and Desty.

However, it is only necessary to quote the second succeeding paragraph in order to show that the interpretation we have placed upon the provisions of Sec. 7 of the charter is correct. It is as follows, viz.:

"The words 'shall provide for the punishment of any violation of such ordinances or regulations by fine or imprisonment,' found in section seven (7), refer to ordinances which the common council is authorized to pass and have executed, as may be necessary and proper to preserve the peace and good order of the city, and to maintain its cleanliness and health."

And inasmuch as the same section of the charter which confers upon the common council power to pass ordinances for the purpose of keeping and maintaining the cleanliness and health of the city likewise confers upon them the power to pass ordinances providing "that all premises, yards, streets and alleys shall be kept in cleanly condition," and also confers the power on them to pass ordinances requiring all streets, public squares, wharves, landings, etc., to be kept open and free from obstruction, the power to pass ordinances providing for the punishment of any violation of such regulation by fine and imprisonment is clearly and easily inferable therefrom.

The various powers enumerated are of the same generic character and are germane to each other; it is our conclusion that the common council had the statutory authority to pass the ordinance in question, and same is consequently legal and valid.

On the ground of defendant's contention that Natchez alley did not fall within the designation of a street in the sense of the city charter a great deal of testimony was taken; and while it satisfies us that it is not, perhaps, in common parlance a "street," yet it is evidently a public place or way, on which the business and affairs of the abutting proprietors are done, and for a great many years past have been conducted, and comes within the designation of the statute and the ordinance—notwithstanding the defendant's deeds, and those of his authors, disclose that his title extends a few feet into the alley-way.

We think the evidence fairly discloses Natchez alley to be, to all intents and purposes, a *locus publicus*, that has by the uses to which same has been put during a long series of years become dedicated to public use.

The charter confers upon the common council power and makes it their duty to provide that *all premises, yards, streets and alleys* shall be kept in a cleanly condition, and that all *streets, public squares*, etc., shall be kept open and free from obstruction; and the ordinance embraces within its provisions *streets, gutters*, public roads, public grounds, public squares, public places or promenades, banquettes or sidewalks of the city. Either is sufficiently comprehensive to embrace Natchez alley, a public place, that has been thought of sufficient *business* importance to be given a name, like other streets of the city have.

This much is clearly admitted in the brief of the defendant's counsel, in the following paragraph, viz.:

"Plan and survey C, by H. W. W. Reynolds, deputy city surveyor, of March 18, 1880, showing defendant's property, under his title, to be at least 80 feet 7 inches front on Tchoupitoulas street by 119 feet 10 inches in depth, and to include in its measurement 4 feet 11 inches and 6 lines in width by 119 feet 10 inches in depth *in Natchez alley*." P. 3.

A like description of the defendant's property is found in the titles of his authors in 1878 and 1875, and even in 1822, in each of which the side boundary is given as "Natchez alley," notwithstanding his premises impinge on the alley to the extent of 4 feet 11 inches and 6 lines on one side.

It is true that Natchez alley at its intersection with Tchoupitoulas street, and where it, in part, bounds the defendant's lot, is not of sufficient dimensions to admit of the passage of wheeled vehicles of any kind, but it is of sufficient width to admit of free passage to pedestrians going in the direction of the Mississippi river, and upon it the properties of various abutting proprietors front. This alley is one of the minor arteries of commerce and trade in the city.

It has been frequently decided that a formal act of dedication to public use is not essential to constitute a *locus publicus*.

"After being set apart for public use and enjoyed as such, and private and individual rights acquired to it, the law considers it in the nature of an *estoppel en pais*, which precludes the original owner

from denying such dedication. 2 Dillon Mun. Corp., p. 598." Heirs of Leonard vs. Baton Rouge, 39 An. 283.

"To support a dedication to public use, it must appear that the property *has been so used with the assent of the owner*, or else it must appear unequivocally by some plan, or writing, that the owner had made a dedication, to violate which would involve a breach of good faith." Saulet vs. New Orleans, 10 An. 81; Arrowsmith vs. New Orleans, 24 An. 194.

It was held by the Supreme Court, in an early case, and after a careful examination of the authorities, that a deed or writing was not essential to a valid dedication. Cincinnati vs. White, 6 Peters, 431. See, also, Carrollton vs. Muny, 19 La. 71; Carrollton vs. Jonas, 7 An. 233; New Orleans vs. United States, 10 Peters, 662, 2 Dillon Munc. Corp., Secs 499, 500.

On the evidence adduced we are of opinion that the Recorder correctly held with the prosecution.

Neither counsel for the State or defendant contend that, in such case, and for such purpose—that is to say, for the determination of the *legality* of the fine imposed—the evidence is not examinable on appeal to this court. That question was discussed and decided in State vs. Fourcade, 45 An. —. *Vide* 13th Southern Reporter, No. 3, page 187; State vs. Callac, 45 An. 27; State vs. Dean, 45 An. —.

These three cases are the most recent expressions of this court on the subject and may be accepted as controlling any utterances and opinions of the court in any previous cases, some of which are collated for the purposes of comparison; though analysis and comparison of same is not deemed necessary, as the jurisdiction of the court in the present controversy is not mooted or quest oned. City vs. Bayley, 35 An. 545; Tax Collector vs. Conner, 42 An. 787; City vs. Layman, 43 An. 1180; City vs. O'Neil, 43 An. 1182; State vs. Pittsburg and Southern Coal Company, 41 An. 467; Corporation of Minden vs. Sylvestein, 36 An. 915.

In the third and last contention of defendant, to the effect that the recorder's court is without jurisdiction because the proceeding was, virtually, an attempt to deprive him of his property without due process of law, is altogether without merit, because there is no controversy in the case touching, in any manner, the title to defendant's property, except the one he has himself urged, and to

which reference has been made. This is essentially a criminal proceeding in character and purport, involving an exercise of the city's police power, though the location of the defendant's property adjacent to Natchez alley, is a question in the case; and hence *all other rights of the defendant are reserved.*

Altogether we are of opinion that the appellant has not made out a case entitling him to relief.

Judgment affirmed.

ON APPLICATION FOR REHEARING.

A re-examination of this case has only served to confirm us in the correctness of the conclusions at which we at first arrived; but at the earnest solicitation of counsel for the defendant, we will reiterate the statement that this is essentially a criminal prosecution, in character and purport, involving only an exercise of the police power of the city; that it does not in any manner involve the title of defendant's property, nor does it propose to settle any question of boundary or servitude. Consequently we refrain from expressing any opinion on either of those questions, but expressly reserve all of his rights in these respects.

Rehearing refused.

No. 11,326.

THE STATE OF LOUISIANA VS. PAUL DOBARD.

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An ordinance of the city of New Orleans which makes it unlawful for any one to sell, barter, exchange or otherwise dispose of any lottery ticket or token of any kind, is a police regulation within the meaning of the City Charter and the State Constitution, and is neither illegal or unconstitutional.

APPEAL from the Second Recorder's Court of the City of New Orleans. *Aucoin, J.*

E. A. O'Sullivan, City Attorney, and *Evans & Dunn* for Plaintiff and Appellee.

James C. Walker for Defendant and Appellant.

The opinion of the court was delivered by

WATKINS, J. The defendant appeals from a sentence imposed by the judge of the Second Recorder's Court, condemning him to pay a

fine of $25, or, in default thereof, to be imprisoned for thirty days—the complaint against him being that he had violated the provisions of ordinance No. 92, council series, relative to selling lottery tickets.

As setting out the defences urged in their strongest light, we clip the following from the brief of defendant's counsel, viz.:

"In the court below defendant interposed a plea, attacking the constitutionality of the ordinance in question on several grounds. Only three of the points originally set up are now insisted upon in this brief:

"1. The ordinance is unconstitutional, because *ultra vires*, conferring judicial functions on the recorder, which have never been delegated, and can not be delegated, to the city of New Orleans by the State laws, under the Louisiana Constitution and the United States Constitution. The subject matter of the ordinance is not in the nature of a police regulation, nor implied by nor incidental to the exercise of the corporate powers and franchises conferred upon the city by the laws of the State; that the object of the said ordinance is not to suppress a vocation or an act *malum in se*, nor to promote the public order, health, morals, comfort, safety or convenience of the city, which is the only legitimate sphere in which the police power of the city can be exercised; on the contrary, the purpose of said ordinance is to promote the public revenues and indirectly to discriminate in favor of the Louisiana State Lottery Company, a corporation recognized by the Constitution of this State.

"2. The ordinance violates the State and Federal Constitutions by providing for the arrest, summary conviction and sentence of persons accused thereunder, without trial by jury, and without due process of law, and denies equal protection of the laws to citizens of the United States, to promote the private and individual interests of the said Louisiana State Lottery Company.

"3. The said ordinance is unconstitutional, under *Arts. 92 and 136 of the Louisiana Constitution*, because the same pretends to confer upon the recorders of the city of New Orleans judicial powers extending further than the cognizance of cases arising under the police regulations of towns and cities of this State, and beyond their duties as committing magistrates."

The specific charge of the affidavit is that the defendant violated the aforesaid ordinance by selling illegal lottery tickets.

The provisions of ordinance No. 92, C. S., are as follows, viz.:

"That it shall be unlawful for any person or persons to sell, barter, exchange, or otherwise dispose of any lottery ticket, or token, policy, combination, device, or certificate, or fractional part thereof, in any lottery drawn or to be drawn, in or out of the city of New Orleans, unless the same be duly authorized by the laws of the State of Louisiana." Sec. 1.

"That any person or persons violating the provisions of this ordinance shall, upon conviction, before the recorder within whose jurisdiction the offence was committed, be condemned by said recorder to pay a fine of $25 for each offence, and in default of payment, to be (condemned) to imprisonment for not less than twenty nor more than thirty days." Sec. 2.

This ordinance was passed on January 30, 1883, and has not since been modified or repealed. It is an existing and apparently regular and legal ordinance of the city—conferring upon the recorders of the city plenary and express authority, not only for proceedings thereunder, but to fine and imprison persons violating the provisions thereof.

Consequently the only objections that could be urged against it are unconstitutionality and illegality; and the substance of the defendant's complaint is that "the subject matter of the ordinance is not in the nature of a police regulation," and that its object "is not to suppress a vocation, or an act (which is) *malum in se;* nor to promote the public order, health, morals, comfort, safety, or convenience of the city, which is the only legitimate sphere in which the police power of the city can be exercised."

As a corollary of the foregoing proposition counsel for the defendant alleges that, "on the contrary, the purpose of said ordinance is to *promote the public revenues*, and, indirectly, to discriminate in favor of the Louisiana State Lottery Company, a corporation recognized by the Constitution of this State."

His further proposition is that the ordinance is *ultra vires*, conferring as it does judicial functions on the recorders of the city beyond the scope of the Constitution and the charter of the city.

The common council of the city is authorized by its charter, *inter alios*, "to suppress all nuisances;" and surely it does not require argument to show that the *illicit* sale of unauthorized lottery tickets, within the limits of a great city like New Orleans, is a public nuisance, and within the spirit and intendment of the denunciation of the city charter. Sec. 7, Act 20 of 1882.

That such illicit sale of lottery tickets is a subject matter that comes within the "police regulations of towns and cities within this State," in the sense of the organic law, seems to be a proposition so self-evident that argument is not required in support of it. Arts. 92 and 136 of the Constitution.

The suppression of the sale of illegal lottery tickets certainly has a tendency to promote good morals; and it is, inferentially, conceded by the defendant, that if such were the case the ordinance would possibly come within the charter and the Constitution.

We can not discover in what way the ordinance could possibly promote or increase the public revenues of the city, as it imposes no fine upon the sale of lottery tickets, such as a license and the like; but it does impose a fine or imprisonment, as a penalty for selling unlicensed lottery tickets. Instead of encouraging the sale of lottery tickets the ordinance prohibits and discourages it, in the strongest terms—the fiat of the ordinance being that "it shall be unlawful for any person or persons to sell, barter, exchange, or otherwise dispose of any lottery tioket * * * unless the same be duly authorized by the laws of this State."

Nothing could be farther from the *expressed* object of the ordinance, than to make the traffic in illicit lottery tickets a source of revenue to the city; for the only saving clause of the same, looking to a possible sale of lottery tickets, is that in respect to such sales as might be authorized by the State, and which the city by ordinance would be powerless to prevent.

The further objection that the ordinance is illegal, because it tends to discriminate favorably to the Louisiana Lottery Company, is equally without merit, because the city is powerless to control the action of the State in the premises. The object had in view by the framers of the ordinance doubtless was, to guard the city against even the appearance of running counter to a statute law of the State on the subject of the sale of lottery tickets.

That in such case, as those provided for in the ordinance, the Legislature has constitutional power to confer on the City Council delegated authority to vest in city recorders jurisdiction of such offences, we have no doubt.

Judgment affirmed.

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No. 11,296.

THE STATE OF LOUISIANA VS. J. W. VON SACHS AND ALBERT N. PARKER.

The City Council of New Orleans has no power to enact an ordinance requiring parties conducting a legitimate business to give bond for the faithful discharge of duties connected with said business, and to answer in damages to any one who may be injured in dealing with persons conducting such business.

Ordinance 6609, Council Series, is null and void, being illegal and unconstitutional.

APPEAL from the Second Recorder's Court of the City of New Orleans. *De LaBretonne, J.*

E. A. O'Sullivan, City Attorney, and *T. R. Rozier*, Assistant City Attorney, for Plaintiff and Appellee.

Simeon Belden for Defendant and Appellant.

The opinion of the court was delivered by

MCENERY, J. The defendant, Parker, was prosecuted before the Second Recorder's Court of the city of New Orleans for violating Ordinance No. 6609, Council Series. In the recorder's court he denied the legality and constitutionality of the ordinance. He was convicted and has appealed, under Art. 81 of the Constitution.

The ordinance, after reciting that the council had been informed by the press of the city that various acts of a criminal nature had been committed by labor agents, provides that labor agents, conducting business in the city of New Orleans, shall give a bond in the sum of $5000, payable to the mayor, conditioned for a faithful discharge of duty in conducting a labor agency. The labor agent is required to furnish this bond before conducting the business, and if he does not he is subjected to fine or imprisonment. Any one who has been injured by the acts of the labor agent has a property in the bond and is authorized to sue on it.

In the license act of 1890 we do not find this occupation classed among those from which a revenue may be derived. But we have decided that while an occupation may be relieved from taxation, yet when the State or municipal authority selects it for a license tax, constitutional methods must be observed.

It is not stated whether the city has taxed, by license, this occupation, but we know from the record that it is a recognized business of such proportions as to require municipal regulations.

It is permitted to be conducted—it must therefore be a legitimate occupation; otherwise it would require legislation to suppress it instead of regulating its existence.

The City Council can exercise only such power as legislative authority confers upon it. It can prohibit no business authorized by the Legislature, and when it assumes that the Legislature authorizes the taxation of the occupation, under Sec. 12 of Act 101 of 1890, it can not, in authorizing the business or occupation to be carried on, impose obligations not authorized by the Legislature. If it can require a person pursuing one occupation, which is recognized as legitimate, to give bond for the faithful discharge of duties connected with the same, it can require a bond from any one pursuing any other occupation.

We fail to find any such authority granted to the city of New Orleans by the Legislature.

The bond is by the ordinance made to inure to any one injured through the instrumentality of a labor agent for any damage done by said agent, or for any fraud or misrepresentation committed by him.

Thus the city undertakes to protect parties who may resort to a civil suit for damages which may result in dealings with the labor agent.

We alse fail to find authority for the city of New Orleans to exact a bond from any one pursuing any occupation to answer in damages for injuries inflicted by the person pursuing said occupation.

The ordinance, we learn from the preamble, was intended to protect females from being imposed upon. It is laudable in its purpose, but the acts at which the ordinance is leveled fall under criminal statutes of the State.

The ordinance is manifestly illegal and unconstitutional, and therefore null and void.

It is therefore ordered, adjudged and decreed that the judgment appealed from be annulled, avoided and reversed, and the prosecution of defendant be dismissed, and the city to pay all costs.

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No. 11,382.

THE STATE EX REL REMINGTON PAPER COMPANY VS. T. C. W. ELLIS, JUDGE CIVIL DISTRICT COURT, PARISH OF ORLEANS.

Property in the hands of a receiver, acting under the orders of the court, can not be seized by a creditor.

The office of an attachment or sequestration is to seize and hold property until the further orders of the court. Being already in the hands of an officer of the court, for distribution among creditors, the object to be accomplished by a seizure is attained. A creditor basing his rights on property in the hands of a receiver appointed by the State court, on writs issued from a Federal court, which are referred to the State court having jurisdiction of the property, he has no cause to complain of an order of the State court ordering the property to be sold when his debt is recognized and referred to the proceeds of sale. He can not appeal from the order to sell the property, as it can not irreparably injure him.

A party can not obtain a suspensive appeal from a judgment on a rule which carries into execution a judgment already rendered The judgment can be arrested only by a suspensive appeal or by injunction.

APPLICATION for Mandamus, Prohibition and Certiorari.

Merrick & Merrick for the Relator.

H. L. Garland and *B. R. Forman* for the Respondent.

The opinion of the court was delivered by

MCENERY, J. This is an application for writs of prohibition, mandamus and certiorari.

The relator alleges that he has a valid claim against the Louisiana Publishing Co., amounting to $3868.55, for paper furnished said company, and on which he has a vendor's privilege; that he brought suit on said claim in the United States Circuit Court for the Eastern District of Louisiana, and obtained writs of attachment and sequestration, and in pursuance of same the property of said company was seized by the marshal; that one John D. Watson, illegally claiming to be receiver of said company, and illegally claiming to be in possession of the property seized under said writs in virtue of an appointment he received by one of the judges of the Civil District Court for the parish of Orleans, filed on the 30th day of May, 1893, in said Circuit Court a motion to set aside the writ of sequestration

and attachment, and on the trial of said motion the judge of said court, on the 6th day of June, ordered that the marshal restore the property seized in the cause under writs of sequestration and attachment to said John D. Watson, receiver, unless within five days the plaintiff applies for and ultimately receives authority from the Civil District Court, parish of Orleans, which appointed Watson receiver, or from the appellate court, to hold same under said writs; that the relator applied within five days from the rendition of the judgment for authority to hold said property attached and sequestered under said writs; that said receiver, Watson, filed an exception to relator's petition, that it disclosed no cause of action, which was sustained, and from which judgment he appealed. Before this judgment became final Thos. B. Lyons and D. J. Norwood sued out a rule on relation in Division A, Civil District Court, and on the marshal to show cause why they should not cease and desist from in any way interfering with said receiver in the possession of said property of the La. Publishing Co., or be punished for contempt of court, and that the receiver was ordered to show cause why he should not pay to Thos. B. Lyons $300 for the price of the lease of premises 41 Natchez street, occupied by said publishing company, and also why said receiver should not pay D. J. Norwood $300 for the price of the lease of 43 Natchez street, occupied by said company, both sides claiming the lessor's privilege.

The receiver was also required to show cause why he should not deliver up said premises. In the rule there was a prayer to sell the property stored in said premises to pay said amounts. The rule was made absolute, so far as to order the sale of the property after thirty days' advertisement, and to maintain the receiver in possession of the property, and to proceed in the execution of his duties. The receiver was ordered to pay rent for the month of October out of the proceeds of sale, and the rights of the lessors, the Remington Paper Co., and other creditors, *reserved* and *referred* to the proceeds. The relator applied for a suspensive appeal from this interlocutory order, which was refused. He applies to this court for the necessary process to compel the respondent judges to grant said appeal on the ground of irreparable injury in the execution of the order, as it amounts to an annulment of the suspensive appeal taken by the relator from the judgment dismissing his suit in which he applied for the recognition of his attachment and sequestration,

and for the authority of the marshal to hold said property in virtue of said writs.

The prayer of relator is that writs of mandamus, prohibition, certiorari, issue from this court directed to the judge of Division A, Civil District Court, Orleans parish, compelling him to allow a suspensive appeal from the judgment rendered by him and signed September 19, 1893; that said judge of Division A, Civil District Court, and John D. W tson, claiming to be receiver, be prohibited from proceeding further in this case, so far as the property attached and sequestered is concerned, in suit No. 12,191 of the docket of the Circuit Court for the Eastern District of Louisiana, entitled Remington Paper Co. vs. Louisiana Printing and Publishing Co., and that said judge be commanded to send to the Supreme Court certified copies of the proceedings in the suit of Frank H. Pope vs. Louisiana Publishing and Printing Co., No. 39,100 on the docket of said court.

The receiver was appointed for the Louisiana Printing and Publishing Company on the application of Frank H. Pope on 17th May, 1893. The facts upon which the appointment of receiver was made are alleged in the petition to be insolvency of the company, the resignation of its officers, the abandonment of its franchises and the danger of the loss of its property. No appeal was taken from this order. The legality of the appointment of the receiver is not presented in the proceedings before us.

While the property of the company was in the hands of the receiver it was seized by writs of attachment and sequestration sued out by defendant in the United States Circuit Court.

It is a well established principle that where one of two courts of concurrent jurisdiction has taken cognizance of a cau e the other will not entertain jurisdiction of the same case. 8 Ohio, 373; 27 Vt. 518, Id. 470; 25 Barb. 513; 8 Md. 255; 4 Texas, 4; 19 Ala. 438; 1 Fla. 198; Massy vs. Gordy, Sheriff, 28 An. 586; Adams & Co. vs. Vaunis, 29 An. 315.

Recognizing this doctrine and applying it in the exercise of the rules of comity which exists among courts, the judge of the Circuit Court for the Eastern District of Louisiana ordered the release of the property seized under process from his court and referred the relator to the Civil District Court, parish of Orleans, having possession of and jurisdiction over the property for the r cognition of his seizure and the enforcement of his rights thereunder. No attach-

ment or sequestration proceedings are now pending in that court, nor does the marshal retain possession of the property.

In a proper case, in which property is liable to attachment, we have no doubt that the respondent judge, on process from the United States court, in the exercise of the rules of comity would order that the attachment levied by the marshal should have the force of a constructive seizure when referred to him as in this case by the Federal judge.

In this case the property was not liable to be seized by a creditor while in the hands of the receiver. Property held by representatives, such as administrators, executors, trustees and receivers, holding under the orders of court, can not be seized by creditors. 1 Johnson Cases, 372; 9 Wendell, 465; 23 Ala. 369; 2 Dallas, 73, 79; 1 Martin, 202, 380.

The effect of an attachment or sequestration is to seize and hold property until it is subjected to the further orders of the court. Being already in the hands of an officer of the court for distribution among creditors, the object to be accomplished by a seizure is already attained.

Basing his rights upon the seizure by virtue of the writs from the United States Circuit Court, and having been referred to the court having jurisdiction of the property, if the relator is not entitled to the writs he has no cause of complaint and does not even show an appealable interest. He can certainly suffer no irreparable injury, as his debt was recognized by the District Court and referred to the proceeds.

That part of the judgment in the rule complained of was only to protect the possession of the receiver, and did not determine ultimate rights of the relator. King vs. Wooten, (C. C. A.) 5 F. 612.

There was no appeal from the judgment appointing the receiver. Therefore this judgment can not be attacked collaterally in an answer to a rule instituted for the purpose of carrying into execution the original judgment. The judgment could only be annulled by injunction or a suspensive appeal. Elder vs, Judge, 30 An. 229; State ex rel. Schmidt vs. Judge, 27 An. 703; Boutte vs. Executor, 30 An. 177.

The relief prayed for is denied and the rule granted herein discharged.

Rehearing refused.

Mr. Justice Parlange takes no part.

No. 11,282.

NATCHEZ & NEW ORLEANS PACKET AND NAVIGATION COMPANY VS. LOUISVILLE UNDERWRITERS ET AL.

There was no necessity of remanding the case for the trial of issues presented and decided.

For the reason that reference was made to a special agreement *dehors* the policies of insurance, under which the defendants were bound to undertake the salvage of the wreck, the right to sue for damages for its violation was reserved.

APPEAL from the Civil District Court for the Parish of Orleans. *Ellis, J.*

B. K. Miller and *B. B. Howard* for Plaintiff and Appellant.

J. R. Beckwith, Amicus Curiæ.

The opinion of the court was delivered by

BREAUX, J. Plaintiffs sued the defendants and in their petition alleged that on the 1st day of January, 1889, the steamer Natchez was destroyed by striking a hidden obstruction in the Mississippi river at or near Lake Providence.

That the loss was within the terms of the policies of insurance held by them; that the defendant companies through their agent and representative were duly notified by the superintendent of the company of the loss, and he afterward abandoned the wreck to the defendant companies through their agent, who took charge of the wreck.

That it was the duty of the agents, *and their agreement also*, immediately to proceed to the salvage and relief of the wreck for the benefit of the insurers and the insured.

That in violation of their duty, and in collusion against petitioner, the agents delayed and neglected to take any steps toward the salvage of the wreck, for which they had ample time, until the river rose and caused said wreck to go to pieces and rendered the salvage impossible, without due notice to plaintiff.

That had the agents immediately proceeded to the salvage of the wreck there could have been saved property to the value of at least $43,000, of which plaintiffs' share under the terms of the policies would have been two-thirds.

The defendant filed an exception of no cause of action.

It was sustained by the District Court.

On appeal to this court the judgment of the District Court was affirmed. That ended the case.

The position of the plaintiffs, as we interpreted it, was that the steamer was abandoned to the agents of the defendant companies and that owing to the negligence of these agents the wreck became a total loss.

Assuming for the trial of the exception of no cause of action that there was negligence, we held (in the case 44 An. 714) that, within the terms of the policies, these agents acted for all parties concerned. That whether the agent was the master, the supercargo, or an appointed agent within the policy, he acted for the insured to the extent of his interest, and represented the *quasi* partnership (insured and insurer) *quoad* the wreck and his acts were for account of the partnership; that one of the partners, the insured, could not hold the other, the insurer, responsible for the acts of the common agent.

The authorities upon the subject do not announce the principle that under the terms of a policy it is the duty of the insurer to proceed immediately to save the wreck and account to the insured for his share; nor that it is incumbent upon the insurer to follow the vessel insured in order to be prepared to save the wreck for the benefit of the insured, but that it is the duty of the master, after abandonment, to save the wreck for the benefit of the insured and the insurer.

This was the theory of the decision, and controlled in affirming the decision of the court *a qua*.

While examining the case our attention was attracted by the allegation that it was the duty of the agents and their agreement also (*heretofore italicized by us*), also by the statement in plaintiffs' brief:

"But superadded to the obligation of defendants under the policies and the abandonment under it, plaintiffs allege that defendants, through their agent, agreed to undertake the salvage of the boat for the benefit of themselves and of petitioner."

All the issues arising under the policies were finally decided and reported in 44 A.

But we determined, if there was a separate agreement, to reserve to plaintiff his right to sue on account of its violation under sufficient allegations.

This reservation was to enable them to sue in a separate and distinct suit.

The action of the District Court was correct and must be affirmed.

The judgment appealed from is affirmed at appellant's costs.

No. 11,226.

SUCCESSION OF MYRA CLARK GAINES.

OPPOSITION OF JOHN R. CONWAY.

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A demand against a succession, unsupported by written proof, for services alleged to have been rendered the decedent more than ten years before making the demand, in pressing a certain claim before the Common Council of New Orleans will be rejected.

APPEAL from the Civil District Court for the Parish of Orleans. *King, J.*

Thos. J. Semmes for the Succession, Appellee.

Frank McGloin for the Opponent, Appellant.

The opinion of the court was delivered by

PARLANGE, J. This is an opposition by John R. Conway to the account filed by the administrator of the succession of Myra Clark Gaines. The opponent claims $1500 for services which he avers that he rendered the decedent. He alleges that "shortly before August, 1877, she employed him to present her demands against the city of New Orleans for rents and revenues and other indebtedness arising out of or connected with the litigation known as the Gaines case." He alleges that under said employment he presented to the Common Council of the City of New Orleans, on August 10, 1877, a petition prepared by himself, setting forth the demands of decedent and the reasons why the same should be liquidated. That on September 24, 1877, said employment was confirmed in writing and opponent's compensation was fixed at $5000 in case of success. That neither opponent nor decedent was able to secure the contemplated settlement, and that negotiations of a different character were suggested, opponent being frequently consulted by decedent during said negotiations. That said employment continued up to the date of dece-

dent's death, and that "although a stipulated sum was fixed in case of success, yet it was not the understanding that opponent was to receive no remuneration for his services in case the city of New Orleans did not accept the first proposition advanced, but on the contrary, compensation in any event was contemplated and is due; that the sum to which opponent is entitled for said services is at least $1000. That opponent in addition was frequently employed and consulted from the year 1877 to the death of said Myra Clark Gaines, concerning other interests and matters, interviewing capitalists, explaining to them the character of the claims of Mrs. Gaines, with a view to enabling her to raise necessary funds; that said other services were frequent and continuous, without specific memoranda as to dates." The latter services are alleged to be worth $500.

The evidence in support of the claim consists of the testimony of the opponent, corroborated as to the general matter of the alleged employment by another witness, who testifies that Mrs. Gaines told him that she had employed the opponent to act for her in connection with her claim. The opponent offered in evidence a copy of a public newspaper published in the year 1877, containing the above mentioned petition of decedent to the City Council, which petition opponent prepared for her.

The only services shown by the testimony in an appreciable manner are the preparation of the petition and its presentation to the City Council in the year 1877, and calls which the opponent made upon officials of the municipal government with a view of pressing the petition upon their attention. We are satisfied from the evidence that, as regards the above mentioned petition, no appreciable service was rendered within ten years from the filing of the opposition. The petition is not a lengthy one and its contents do not show that special skill and knowledge were required to compose it, or that much labor was expended upon it. On behalf of the administrator, it is testified that the bill in equity on which the money now under administration was collected, was filed in the United States Circuit Court in August, 1879, the final decree being rendered in said court in May 1883. On appeal to the Supreme Court of the United States, the matter was the subject of two decrees, one rendered in May, 1889, and the last and final one in 1891. The opponent not being a lawyer, and making no claim in such capacity, it

seems clear that he could not have rendered decedent any service in the matter of her claim, under the employment first set out in the opposition, after the bill in equity was filed. Decedent employed opponent in 1877 to undertake a settlement or compromise of her claim with the City Council, but it seems clear that all hope of effecting such a compromise must have been abandoned prior to the filing of the bill in equity.

As regards opponent's claim for services in interviewing capitalists, etc., he admits that he did not succeed in borrowing any money for the decedent, and we consider the testimony as insufficient to support a judgment on that part of the claim.

Opponent's counsel contends in his brief that prescription did not run because Mrs. Gaines was not to pay opponent until her claim was realized. Opponent testified that decedent told him that she would compensate him "out of the collection of this claim," and "when she realized the money from the city." In his opposition opponent avers, as stated, that his employment was confirmed in writing on September 24, 1877, and that his compensation, in case of success, was fixed at $5000. We have sought in vain in the record for this writing. If such a writing had been produced it would perhaps have created an irresistible presumption that compensation was to be made only in case of success. Opponent was employed to settle the claim in a particular way. He was unsuccessful. He was not even remotely instrumental in bringing about the collection of the claim, which was effected through the courts.

The act of 1858 to require written proof in certain cases, now Art. 2278 C. C., has been declared to be a law of public order. 23 An. 747; 26 An. 221, and see 34 An. 228 and 232.

The plea of prescription in this case must prevail.

It is therefore ordered, adjudged and decreed that the judgment of the lower court dismissing said opposition of John R. Conway be and the same is hereby affirmed at appellant's costs.

No. 11,335.

THE STATE EX REL. E. FEIBLEMAN, SONS & CO. VS. THE JUDGE OF THE NINETEENTH DISTRICT COURT.

1. To stay the execution of an order of seizure and sale by a suspensive appeal, an appeal bond must be furnished, within the delays allowed by law, in a sum exceeding by one-half the sum for which the order of seizure and sale issued. An appeal bond in such a case is governed by Art. 575, C. P.

2. Where in such a case, an appeal bond has been furnished which is insufficient in amount under Art. 575, C. P., to sustain a suspensive appeal, and where the appellee moved in the lower court for a dismissal of said appeal on the ground of such insufficiency, and the judge of the lower court refuses to pass on the question under the erroneous belief that the matter is not before him, relief will be granted to the appellee on an application to this court for writs of certiorari and mandamus.

APPLICATION for Mandamus and Certiorari.

Clegg & Thorpe for the Relators.

Foster & Broussard, *Albert Voorhies* and *F. P. Pochè* for the Respondent.

The opinion of the court was delivered by

PARLANGE, J. Edward Feibleman and others, composing the commercial firm of E. Feibleman, Sons & Co., obtained an order of seizure and sale from the judge of the Nineteenth Judicial District Court. O. P. Romero and E. B. Bayard, whose property had been seized under the order, alleging that no authentic evidence had been produced showing the transfer to E. Feibleman, Sons & Co. of the mortgage note for the satisfaction of which the order of seizure and sale had issued, prayed for a suspensive appeal from the order. They asked that the amount of the appeal bond be fixed. The judge granted the suspensive appeal returnable to this court, at Opelousas, on the first Monday of July, 1894, and he fixed the amount of the appeal bond at a sum considerably less than that required by Art. 575 C. P. Subsequently, and after the delays within which a suspensive appeal can be taken had expired, the plaintiffs in the executory proceedings moved to set aside the appeal on two grounds: that the appeal bond is not good and such as the law requires, and that the sureties are not good and solvent.

The respondent judge, after hearing the parties, dismissed the rule to set aside the appeal. As to the solvency of the sureties he decided that the same was established to his satisfaction. But he did not pass on the question of the sufficiency of the amount of the appeal bond. On that point he said in dismissing the rule:

"By reason of the suspensive appeal taken this court (the Nineteenth Judicial District Court) is divested of all further control over

the case; the Supreme Court alone has power and right to pass upon the sufficiency of the bond as to its amount, which is fixed by special provisions of the law. The law vests this court, however, with the right and power to pass upon the solvency of the sureties, because solvency is a fact to be established or disproved and thus requires evidence, whilst the sufficiency of the amount of the bond being a naked question of law requiring no proof, as it is fixed by law, is to be determined by the Supreme Court, which has exclusive control of the case on appeal."

In his return the respondent judge says: "This rule (the rule to dismiss the appeal) was tried and discharged; the court deciding that it had been divested of jurisdiction to pass upon the bond so far as its sufficiency in amount was concerned, but holding that the sureties on the bond were solvent."

To stay the execution of an order of seizure and sale by suspensive appeal, an appeal bond must be furnished within the time allowed, in an amount one-half over and above the sum for which the order issued. 22 An. 35; 20 An. 179; 27 An. 707; 30 An. 1041.

An order of seizure and sale to the sheriff, directing him to seize and sell specific property to pay a specified sum, is unquestionably "for a specific sum" within the intendment of Art. 575 C. P. In the case above cited, 22 An. 35, in which the district judge, after fixing the amount of the suspensive appeal bond in executory proceedings, at a sum less than that required by Art. 575 C. P., rescinded the order of appeal, this court said: "To suspend the execution of a judgment for a specific amount, whether it be an order of seizure and sale or an ordinary judgment, the appeal bond must conform to 575 C. P. (20 An. 179). If the appellant fails to furnish such a bond, within the legal delays, the appellee has the right to proceed with the execution notwithstanding the appeal. (C. P. 578; 8 R. 186; 5 La. 129; 5 An. 360; 12 An. 175.) * * * Whether that part of the order fixing the amount of the bond in a sum less than that required by law for suspensive appeals was rescinded or not, the appellee was entitled to proceed with the execution of the order of seizure and sale."

In the case of State ex rel. Gill vs. Judge, 34 An. 90, this court said that the jurisprudence seems to be now firmly settled that it is only *after* a suspensive appeal has been obtained *and perfected* that the lower court ceases to have further jurisdiction over the case, and

that the door has always been wisely left open for the determination by the court of the first instance of the question whether the judgment suspensively appealed from shall not be executed, either because the case is unappealable, or because no bond has been furnished, or because that furnished is insufficient or because the surety does not possess the required qualifications. See the authorities cited in the case referred to.

In the same case this court distinctly said: "Where such bond (*i. e.* a bond for a suspensive appeal) is insufficient an appellee has two remedies, either to move for a dismissal of the appeal in the appellate court, or for the execution of the judgment appealed from in the court of the first instance. Where he resorts to the first remedy the matter becomes finally adjudicated upon by the superior tribunal. Where he employs the second remedy the action of the inferior court is revisable either on appeal, or on application for remedial process."

In the instant case the relators, who are the plaintiffs in the executory proceedings, have elected to apply for remedial process.

The learned counsel for the respondent judge pretermit in their brief the discussion of the question whether the bond is an amount sufficient to sustain a suspensive appeal, and their efforts are devoted to the task of showing that this is not a case in which the relief asked for by relators can be granted to them under their application for remedial process. Relators have applied for writs of certiorari and mandamus. They could not have asked for the writ of prohibition under their theory that the matter complained of is still in the lower court.

If the contention of the counsel for the respondent judge be correct, it would seem that the matter presented would be one beyond the reach of any remedial process from this court. But we need not, in order to decide the issues presented, determine whether we have the power, under proceedings such as these, to order the undoing of unlawful acts. It would seem clear, however, that if a judge does an act which is void in law his subsequent affirmance of the void act amounts to naught.

In this case the district judge fixed the amount of the appeal bond in a sum which the law declares to be insufficient to sustain a suspensive appeal. His act was void for the purpose intended. Subsequently, after hearing the parties, he did not affirm his action,

but simply declined to act, under the mistaken belief that the matter was no longer before him. In this he clearly erred. The matter was before him. On having the insufficiency of the bond called to his attention, he should have dismissed the suspensive appeal. The matter did not involve any exercise of judicial discretion. The failure of the defendants in the executory proceedings to furnish a bond sufficient to sustain a suspensive appeal, invested the relators with the legal right to an execution, of which they can not be deprived, under the circumstances of this case, without a denial of justice.

The two cases mainly relied on by the counsel for the respondent judge in no wise conflict with our views as herein expressed.

In the case of State ex rel. Dodeman vs. Judge, 14 An. 60, the relator sought to have the writ of mandamus issue to compel the judge of the lower court to rescind an order for a suspensive appeal, from a judgment which the relator contended had been rendered on the judicial admissions and confessions of the appellant, and which judgment the relator claimed was therefore unappealable. That case involved a matter of judgment and opinion which this court said could well await decision on the appeal which had been taken to this court.

In the case of State ex rel. Forsythe & Robertson vs. Judge, 42 An. 1104, this court refused to compel the lower judge to rescind an order for a suspensive appeal, because he had not in any of the proceedings transcended the bounds of his jurisdiction or of judicial power.

The relators are clearly entitled to the relief they have applied for.

It is therefore ordered that the appeal bond in this case is hereby declared to be insufficient, null and void for the purpose of sustaining the suspensive appeal from the order of seizure and sale issued in this case. It is further ordered that the judge of the Nineteenth Judicial District Court try anew, according to law, the rule taken by the relators to obtain the dismissal of said suspensive appeal; and the writ of mandamus herein is hereby made peremptory.

Rehearing refused.

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No. 11,371.

THE STATE OF LOUISIANA VS. ANATOLE PRICE.

1. Section 790 R. S., as amended by Act 24 of 1892; Section 791 R. S., as amended by Act 43 of 1890, and Act 44 of 1890, are harmonious parts of one subject of criminal punishment.

2. The offences denounced by Act 44 of 1890 are contained in Act 43 of 1890, and the offences denounced by the latter are contained in Sec. 790 R. S.
3. An information properly drawn under Sec. 790 R. S. contains accusations under all three of said statutes, to wit: Sec. 790 R. S., Sec. 791 R. S. and Act 44 of 1890.
4. A verdict under Sec. 793, R. S. is not responsive to an accusation under any one of said three statutes.

APPEAL from the Nineteenth District Court, Parish of Iberia. *Voorhies, J.*

John R. Land, District Attorney, for the State, Appellee.

Chas. Fontelieu for Defendant and Appellant.

The opinion of the court was delivered by

PARLANGE, J. The defendant is prosecuted under Sec. 790 Revised Statutes for the capital crime of striking a person with a dangerous weapon, to-wit: a club, while lying in wait, with intent to kill and murder.

The district judge charged the jury that they might find the following verdicts: 1. Guilty. 2. Guilty without capital punishment. 3. Guilty under Sec. 791 R. S., as amended by Act 43 of 1890,. 4. Not guilty.

The defendant asked the further charge, which was refused, that verdicts might be found under any one of the following statutes: 1. Act 44 of 1890. 2. Sec. 793 R. S. 3. Sec. 796 R. S.

The jury found a verdict under Act 43 of 1890; the defendant was sentenced and he has appealed.

The question to be decided is whether the defendant was entitled to the additional charge which he asked, the most serious part of his complaint being whether in a prosecution under Sec. 790, verdicts under three statutes are responsive, to-wit: Sec. 790 as amended by Act 24 of 1882; Sec. 791 as amended by Act 43 of 1890; and Act 44 of 1890.

It is impossible to consider those three statutes conjointly without reaching the conclusion that they deal with one and the same subject matter, to-wit: the offences of shooting, stabbing, cutting, striking and thrusting with a dangerous weapon, with criminal intent to take life, under circumstances of varying aggravation.

The denunciatory parts of the three statutes read as follows:

Sec. 790 as amended by Act 24 of 1882: "If any person, lying in wait, or in the perpetration or attempt to perpetrate any arson, rape, robbery or burglary, shall shoot, stab, cut, strike or thrust any person with a dangerous weapon, with the intent to commit the crime of murder, he shall," etc.

Sec. 791 as amended by Act. 43 of 1890: "Whoever shall shoot, stab, cut, strike or thrust any person with a dangerous weapon, with intent to commit murder, under any other circumstances than those mentioned in the preceding section, shall," etc.

Act 44 of 1890: "Whoever shall shoot, stab, cut, strike or thrust any person with a dangerous weapon, with intent to kill, shall," etc.

Section 790 deals with that part of the subject matter which denounces and punishes the most aggravated of those offences; Sec. 791 as amended deals with the offences when accompanied by less aggravation, and finally, Act 44 of 1890 deals with the offences in their least aggravated form.

For instance, shooting with intent to murder, while lying in wait, is a capital crime under Sec. 790. Without the aggravation of lying in wait, the offence falls under Sec. 791, the extreme penalty of which is twenty-one years' imprisonment at hard labor; and when from this second offence the element of a murderous intent is eliminated and the intent to kill is substituted, a third offence remains, the least aggravated of the three, which is defined by Act 44 of 1890 and the maximum penalty of which is three years' imprisonment with or without hard labor.

Acts 43 and 44 of 1890 were passed almost concurrently by the General Assembly. Act 43 of 1890 amended Sec. 791 so as to make the language of this section coincide exactly with that of Act 44 of 1890 as regards the substantive criminal acts of shooting, stabbing, cutting, etc., denounced by the latter. The same verbal change which Act 43 of 1890 effected in Sec. 791 had been previously effected in Sec. 790 by Act 24 of 1882.

The verbal similarity of the three statutes as they now stand, intentionally brought about by amendatory acts, and the adjustment of the penalties in proportion to guilt, clearly show that the lawmaker intended to make them and did make them harmonious parts of one subject of criminal punishment.

In Wilson's case, 39 An. 204, this court, speaking of Secs. 790 and

791, said: "For the purposes of prosecution the indictment needed not to be framed under the first section to secure conviction under the second section; for the same reason that, on an indictment for murder, a verdict of manslaughter can be legally found and returned. The two sections may be treated as one and the same law, justifying a verdict under either the first or the second section, the moment that the jury find a state of facts under either." To the same effect was the decision in Evans' case, 40. An. 216.

Manifestly, Act 44 of 1890 was passed for the purpose of dealing further with the subject matter of Secs. 790 and 791. It is clear that the offences denounced by Act 44 of 1890 are contained in those denounced by Sec. 791; that the offences denounced by the latter are contained in those denounced by Sec. 790, and that an indictment under Sec. 790 contains charges under the two other statutes.

The cases cited by the District Attorney in his brief (Hendricks' case, 38 An. 682, and Allen's case, 40 An. 201) were decided before the passage of Act 44 of 1890.

The defendant was therefore clearly entitled to the charge that in a prosecution under Sec. 790 the jury may find a verdict under Act 44 of 1890, and the refusal to so charge was prejudicial error.

So far as Sec. 793 is concerned, this court held in State vs. Allen, 40 An. 200, that a verdict under that section was not responsive to a charge made under Sec. 791, and the intimate connection between Secs. 790 and 791 and Act 44 of 1890 has been shown. See, also, State vs. Benjamin, recently decided at Shreveport. The jury therefore could not lawfully have returned a verdict under Sec. 793.

As to Sec. 796, the indictment includes and sufficiently charges an assault and battery and the defendant was entitled to have the jury charged that they could return a verdict under that section.

Defendant further complains that the court did not grant one of the counsel appointed to him sufficient time to prepare for the trial; but it is unnecessary for us to pass upon this ground of complaint, as prejudicial error has already been found.

It is therefore ordered that the verdict and sentence in this case be set aside; that the judgment appealed from be avoided and reversed; that this case be remanded to the lower court to be proceeded with according to law, and that the defendant remain in custody subject to the further orders of the Nineteenth Judicial District Court for the parish of Iberia.

No. 11,398.

THE STATE OF LOUISIANA VS. CLAYTON FRIER.

1. The State has the right to have rejected as jurors parties who declare that under no circumstances would they render a verdict of guilty based solely upon circumstantial evidence, and to propound to jurors on their *voir dire* questions directed to the ascertainment of that fact. State vs. Shelor, 33 An. 994.
2. The overruling by the court of a challenge to the competency of a juror, who, on his *voir dire* declared "that he had formed an opinion from rumor, and that it would take strong evidence to remove this opinion; that he had no bias or prejudice, like or dislike, for or against the accused; that he could render a fair and impartial verdict between the State and the accused, according to the law and the evidence on the trial without being in any way influenced by what he had heard, or the opinion he had formed, sustained." State vs. Ganz, 43An. 867,
3. The refusal by the court to submit to the jury a special charge "that in cases depending upon circumstantial evidence it is but reasonable, in case of doubt, to expect that some motive, and that a strong one, should be assigned as inducement to commit an act from which our nature is abhorrent, and the consequences of which is usually so fatal to the criminal," sustained.

APPEAL from the Thirteenth District Court, Parish of West Feliciana. *Brame, J.*

M. J. Cunningham, Attorney General, and *Jos. L. Golson*, District Attorney, for the State, Appellee.

S. McC. Lawrason for Defendant and Appellant.

The opinion of the court was delivered by

NICHOLLS, C. J. This is a prosecution of the defendant under an indictment charging him with shooting while lying in wait with intent to kill and murder his brother, Sidney A. Frier.

The defendant was convicted by the jury of shooting with intent to kill and murder and sentenced to the penitentiary for fifteen years. He has appealed.

Three bills of exceptions are submitted for our consideration.

The first bill states that upon empaneling the jury the district attorney asked each and every juror upon his *voir dire* the following question: "If it appears by the testimony of witnesses that the guilt of the accused is proven by a chain of circumstances, would you then convict, or in other words, would you convict on circumstantial evidence."

To the propounding of which question the accused, by counsel, objected, as being prejudicial to him, giving the State an unfair advantage in the selection of the jury, and as being tantamount to asking the juror whether he would require much or little evidence to convict. All the jurors answered this question in the affirmative but one, J. H. N. Austen, who said that in capital cases he would not, and two others who said they would not under any circumstances, whereupon the court ordered them to stand aside and refused to allow them to sit upon the jury, over the said objection of defendant, to which ruling of the court in permitting said question and setting aside said jurors defendant excepted.

The district judge, in signing the bill, said: "The accused exhausted his peremptory challenges before the jury was fully empaneled. The jurors mentioned in this bill as being refused and set aside were challenged for cause by the State and the challenges sustained by the court. The question asked the jurors was carefully explained to them to mean whether or not they would in any case or under any circumstances render a verdict of guilty based solely upon circumstantial evidence."

The second bill states that "upon empaneling the jury the jurors —— Harvey, Lewis White and Dave Michel, being examined upon their *voir dire*, answered that they had formed and expressed an opinon on the case and that it would take very strong evidence to remove this opinion, whereupon accused by counsel challenged said jurors for cause, and the court having overruled the challenges, he peremptorily challenged two of said jurors and the third named juror was taken upon the jury because defendant had then exhausted his peremptory challenges. To which ruling of the court in the case of each of said jurors the defendant excepted." Referring to these objections the court said: "Harvey said in answer to questions by the court that he had formed an opinion from rumor—it was not a fixed opinion; he had no bias or prejudice, like or dislike, for or against the accused; that his opinion could be changed if the evidence was strong enough. He could go on the jury and after hearing the evidence on the trial and the law as given by the court and render a fair and impartial verdict between the State and the accused without being influenced in any way by what he had heard or by the opinion he had formed."

"Lewis White said in answer to questions by the court: He had

formed an opinion from rumor and that it would take very strong evidence to remove this opinion; that he had no bias or prejudice, like or dislike, for or against the accused; that he could render a fair and impartial verdict between the State and the accused according to the law and the evidence on this trial without being in any way influenced by what he had heard or the opinion he had formed.

"Dave Michel made the same answers to the questions of the court as did Lewis White, except that he said it would take strong evidence to remove the opinion he had formed."

The court further said that the accused, through counsel, urged especially for the consideration of the court in each of these cases "that the accused might have no evidence to rebut the evidence offered and adduced by the State and might have to depend entirely upon the argument of his counsel to combat the inferences to be drawn from said evidence and that the case depended upon circumstantial evidence."

The third bill is to a refusal by the district judge to charge the jury as requested by counsl of the accused that "in cases depending upon circumstantial evidence it is but reasonable in case of doubt to expect that some motive, and that a strong one, should be assigned as inducement to commit an act from which our nature is abhorrent and the consequences of which is usually so fatal to the criminal."

Defendant claims that the charge was pertinent and had not been covered by the charge of the court.

The court said it refused the charge requested on the grounds—

1. That so far as any part of the requested charge might be pertinent or proper it had been fully covered by the written charge of the court already given.

2. It was misleading.

3. It announced no principle of law applicable to this or any other case.

4. It was merely argumentative.

5. Practically it was a request that the court should charge the jury it would be unreasonable for them to find a verdict unless a strong motive for the crime was proven at the trial.

The objections urged by the defendant to the right of the district attorney to propound to each juror on his *voir dire* the question which he did was not well taken in the form in which the question

was asked and as explained to the jurors (State vs. Shields, 33 An. 994). The State has the right to have rejected as jurors parties who declare that under no circumstances would they render a verdict of guilty based solely upon circumstantial evidence. The action of the court in excluding as jurors the three persons referred to in the first bill of exceptions was not error. The case about to be tried being upon a charge punishable by death, Austen's answer as fully unfitted him for a juror, as the absolute and general answers of the other two unfitted them. The State and the defence both concur in the statement that this case was based exclusively upon circumstantial evidence.

The ruling of the court upon the fitness of the three jurors, Harvey, White and Michel, was evidently based upon and is justified by the line of decisions cited in and acted upon in State vs. Ganz, 43 An. 867.

The special charge asked for was properly refused to be submitted by the judge to the jury. We assume from it that the State had failed to assign and to show affirmatively the existence of a motive on the part of the accused for the commission of the crime. Had the request been granted we think the jury would have unquestionably been led to believe from the language in which it was couched that the case before it was, in the opinion of the judge, one of doubt, and one which reasonably called for the assignment and proof by the State of a strong motive in the defendant to commit the crime. The judge correctly declined to make such a statement.

For the reason herein assigned it is hereby ordered, adjudged and decreed that the judgment appealed from be and the same is hereby affirmed.

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No. 11,402.

THE STATE EX REL. D. NEGROTTO, SR., VS. THE JUDGES OF THE COURT OF APPEALS.

In case an exception of no cause of action is sustained in the District Court, the suit dismissed and an appeal is prosecuted to the Circuit Court of Appeals, the latter is without authority or jurisdiction to dispose of the case finally upon its merits on the theory that such an exception admits the truth of plaintiff's allegations for all the purposes of the case.

Such question does not involve the regularity and correctness of the judgment of said court, but their right to render *any* judgment in that attitude of the case.

APPLICATION for Certiorari.

J. Zach. Spearing for the Relator.

Branch K. Miller for the Respondents.

The opinion of the court was delivered by

WATKINS, J. Relator avers that he is defendant and appellee in the suit entitled Frank Haas et al. vs. D. Negrotto, No. 1062 of the docket of the Circuit Court of Appeals, in and for the city of New Orleans, the object of which is to annul a tax sale.

That to said suit he tendered and caused to be filed a plea of *prescription*, and also an exception of *no cause of action*, which were, upon the trial thereof, sustained and the suit dismissed; that from said judgment the plaintiff prosecuted an appeal to the court of the respondents, and therein said exception and plea of prescription were fixed for trial, argued and submitted; and that those were the only issues or questions that were presented to or argued before the respondent judge, or which could in any manner have been considered or taken as an answer to the merits. That no evidence had been offered, admitted or taken in said cause at any time; that said exceptions were tried in the lower court upon the face of the papers; that the judge of the Civil District Court did not consider or determine the cause on its merits at all; that said cause was not tried in the court of the respondent on its merits, nor was said cause appealed to said court on the merits—the only trial or hearing of said cause in said court having been upon said exception and plea of prescription.

Relator further avers that notwithstanding said state of facts, the respondents did render a pretended judgment and decree upon the merits of said cause, in favor of the plaintiff, annulling his (relator's) title to the property in controversy, recognizing plaintiff to be the owner thereof; that within the legal delay he applied to said judges for a rehearing and was refused; and that his only remedy is by certiorari.

He further represents that said proceedings and judgment of the respondent judges are absolutely null and void, and of no legal effect;

and if same are permitted to remain undisturbed they will work him a great and irreparable injury—said judgment and decree having been rendered without the court having heard the relator or his witnesses on the *merits* of his cause; and that to permit said illegal, null and void judgment to remain undisturbed would be to condemn relator without granting him a hearing or trial, and deprive him of his property without due process of law.

Respondents substantially return that there was in the suit of Haas vs. Negrotto " a *joinder of issue of law* on the exception filed by the defendant to the effect that the plaintiffs' petition disclosed no cause of action which admitted that all the facts therein were true, in manner and form as alleged; and that there was thus a joinder of issue between the parties *upon all the merits of the case* propounded by the plaintiffs; and that upon this issue the parties were heard as they desired; and thereafter, and upon mature consideration, and according to the best judgment of respondents * * * the opinion and decree now complained of was rendered; (and) nothing has since occurred (that) has caused the judges of the court to doubt the correctness of their action in the premises."

Hence, respondents submit that this court is without jurisdictional competency, either in the exercise of its appellate or supervisory powers, to inquire into and decide whether the proceedings and judgment of their court were or were not in conformity to law.

Respondents have sent up to this court—in connection with their return—the original papers and proceedings in the suit of Haas vs. Negrotto, in order that their validity may be ascertained.

The district judge states in his reasons for judgment that the defendant excepted that the petition disclosed no cause of action, and that the plaintiffs' demand is barred by the prescription of three years; and, upon examination of the face of the papers, he decreed that "the exceptions herein filed are therefore maintained and that plaintiffs' suit be dismissed at their cost."

The judgment rendered is in exactly similar words, viz.: "It is ordered, adjudged and decreed that the exceptions herein filed be maintained, and that plaintiffs' suit be dismissed at their cost."

But, in the opinion and decree of the respondent judges, no mention is made of the fact that the District Court judgment was pronounced upon the defendant's exceptions *alone;* and they proceed, broadly, to discuss the *law* of the entire case, in all its bearings upon the *merits* of the controversy—it being concluded thus:

"It is clear beyond controversy, therefore, that, for the foregoing reasons, the judgment of the District Court herein in favor of the defendant, Domingo Negrotto, Sr., is erroneous and must be reversed, and a decree be entered therein in favor of the plaintiffs as prayed for in their petition.

"It is therefore now ordered, adjudged and decreed that the judgment of the District Court herein be reversed and avoided; and that the plaintiffs have *judgment recognizing them as the lawful owners of the property described in the pleadings*, and as such entitled to undisturbed and peaceable possession thereof," etc. (Our italics.)

In the opinion of the respondent judges, upon an application for a rehearing, they make this statement of their own reasons for refusing it, viz.:

"Negrotto's exception, that plaintiff's petition disclosed no cause of action, if sustained, as it was by the judge *a quo*, puts an end to the suit, adversely to the plaintiffs. Such an exception is one of the peremptory class, to be tried and determined *in limine*. If sustained, it terminates the suit; if overruled, the defendant may answer over. Jennings vs. Vickers, 31 An. 679.

"A decision maintaining an exception of this nature is necessarily a decision *upon the merits*, inasmuch as it decided that, admitting all the facts alleged to be true in manner and form as alleged, the case stated in the petition is *without merits* in law.

"For the reasons stated in our original opinion, which go to the root of the whole matter in holding that no State Legislature *has the power* to enact such a statute as Act 82 of 1884, of the State, under the operation of whose provisions, exclusively, Negrotto claims title," etc.

From the foregoing it appears that the respondents entertained the same idea of the effect of a plea of no cause of action, on the trial and decision of the case in their court, as they do in their return, to-wit: That a joinder of issue upon an exception of no cause of action is, in fact, a joinder of issue between the parties upon all the merits of the case propounded by the plaintiffs—such a plea admitting that the acts alleged are true. But the contention of the relator's counsel is, that the respondent's theory, in this respect, is altogether erroneous, and contrary to the established jurisprudence of this court. That the rendition of an *absolute* and *final judgment* against the defendant (relator here), on the state of the record as it

appeared before the court of the respondents, at the time it was decided by them, was an absolute *refusal to hear the defendant, or his witnesses*, in the sense of Code of Practice, Art. 857—the defendant not having filed an answer in the lower court, and no judgment by default having been entered up against him; or in other words, *before issue had been joined upon the record of the controversy before the court of first instance.*

Relator's counsel further insists that such a judgment absolutely *prohibits* the lower court from entertaining any further pleadings in the cause, or hearing *any* evidence therein; that it denies the defendant the right of filing any further plea or proof therein, or of urging *any* matter of defence whatever; that it arbitrarily takes his property and turns it over to the plaintiffs without their having offered any evidence in support of their title or having had a day in court.

That all of these serious and fatal consequences flow from the fact that the respondents assumed, as a matter of law, that a joinder of issue on an exception of no cause of action admitted the *truth* of all the averments of the plaintiff's petition, and constituted "a joinder of issue between the parties upon all the merits of the case."

Counsel for the respondents have furnished us with a large number of authorities touching the authority of this court to examine and determine the question presented for our consideration and summarizes them to the following effect, viz.:

"The above authorities and numerous others show that in a proceeding like the present one the only questions that can be properly submitted to this *court are the validity vel non of the proceedings* of the inferior court on the face of the papers; whether or not there has been a usurpation of power or an arbitrary refusal to hear the party complaining; whether or not he has been denied the substantial right to present to the court his case for its adjudication. The writ of certiorari can not be made to perform the functions of an appeal; the court having jurisdiction of the case, and an issue within their jurisdiction having arisen, its conclusions upon that issue are final and can not be reviewed. There exists no power to weigh its reasoning or to test the methods by which its judgment was arrived at. The record in point of form being complete, the intrinsic correctness of the court's doings within that record have been determined by

the highest power known to the law, and are closed against any inquiry by this court.

"The Court of Appeals having made its adjudication upon a matter within its power to adjudicate upon pleadings made, its construction of these pleadings and its conclusions as to what decree is responsive thereto is inviolate, and is as beyond the supervisory power of any other tribunal as are the decrees of your honors over which there may exist no appellate jurisdiction."

The foregoing propositions are, in the main, correct, and at the same time not inconsistent with the theory of the relator, which, as we understand it, places before us the *invalidity* of the *proceedings* had by the respondents in the suit of Haas vs. Negrotto, and which he has had brought up "to the end that their validity be ascertained" (C. P. 855); and said proceedings being before us, his theory is further to the effect that the *proceedings* of the respondents are absolutely void in the various particulars enumerated, and should be set aside—because the respondents have, in effect, refused to hear the relator or his witnesses. C. P. 857.

Assuming, *in præsenti*, that the relator's complaint is founded in point of fact, the law is clear, for it says:

"If upon examining the certified record thus sent, it shall appear to the court issuing the mandate that the *proceedings* are null and have not been sanctioned by the party complaining of them, *it shall avoid the proceedings and direct the* inferior judge to try the case anew in conformity with the provisions of the law." C. P. 864.

From the foregoing plain textual provisions of the Code of Practice, *certiorari* brings up to the court issuing the mandate all of the *proceedings* that are complained of as absolutely void, to the end that their validity be ascertained; and the court finding the *proceedings* to be absolutely void is bound to avoid them and direct the inferior judge to *try* the cause anew.

And inasmuch as this court has "control and general supervision over *all* inferior courts," coupled with the power to issue writs of *certiorari* and the like, it has and can exercise supervision and control over the court of the respondents. Art. 90 of the Const.

This has been decided by this court in many cases, and notably in the following, viz.: State ex rel. Cobb & Ganby vs. Judges of Circuit Court, 32 An. 774; State ex rel. Harper vs. Judges of Circuit Court, 33 An. 338; State ex rel. Winter vs. Judges of Circuit Court, 33 An.

1096; State ex rel. Gilmer vs. Judges of Circuit Court, 33 An. 1201; State ex rel. Cupples vs. Judges of Circuit Court, 34 An. 1016; State ex rel. Insurance Company vs. Judges, 36 An. 316; State ex rel. Forman vs. Judges, 37 An. 111; State ex rel. Planting Company vs. Judges, 37 An. 582.

Finding that it is the accepted theory of our jurisprudence under the operation of Art. 90 of the Constitution, that Circuit Courts of Appeal come within its meaning and intendment as "inferior courts" with respect to the exercise of the supervisory power of this court, we must ascertain what is the uniform and established jurisprudence of this court in regard to the scope and object of the plea of no cause of action—that is to say, whether such a plea is such an admission of fact as to operate, between the parties, such a joinder of issues on the *merits* of the cause as to authorize the judge to try and decide the case *finally*, and without any other or further plea or answer on the part of the defendant.

The correct rule is formulated in Conery vs. Waterworks, 39 An. 770, in the following words, viz.:

"It is the province of the appellate court to review proceedings of the inferior court and to determine whether its rulings and decrees therein embraced are right or wrong, and not to deal with matters and issues distinctly presented by the pleadings, *but not considered or decided by that court.*" 19 La. 207; 9 R. 256; 7 An. 622; 10 An. 552; 11 An. 746; 15 An. 159.

"We conclude therefore that it is proper to remand the case, that the all-important issue raised by the exception referred to, and not passed on by the court of first instance, may be there tried and determined."

In Wood vs. Henderson, 2 An. 220, the court said:

"We are of opinion, therefore, that the petition for injunction did exhibit sufficient grounds for relief, and that the exception was properly overruled. *But this did not justify the court below in proceeding further, and rendering, upon the exception, a final judgment in favor of the plaintiff in injunction. Upon the dismissal of the motion, or exception, the defendants in injunction are entitled to file an answer in the cause and put at issue the allegation of the plaintiff's petition.*"

In Eulalie vs. Long, 9 An. 11, it was held that an exception that the petition shows no ground of action admits the truth of all the

allegations of the petition; but if the exception be overruled, the defendant will have leave to answer over.

In DeLaCroix vs. Gauns, 13 An. 177, the court, in treating of an exception of no cause of action, said:

"The district judge, conceiving that the second exception was well taken, dismissed the suit, and the plaintiff has appealed."

In this view this court concurred and remanded the cause to enable the defendant to answer, and "for further proceedings according to law." *Vide* Lea vs. Terry, 20 An. 428.

But perhaps there is no stronger or clearer case than that of Smith vs. Donnelly, 27 An. 97, in which the court put their opinion in these words, viz.:

"But we are unable to dispose of the case and render a judgment in favor of the plaintiff as he asks us to do, because no issue has been joined on the demand for the homologation of the award of the amicable compounders, and because the *case was not tried, and no evidence offered on the merits of the demand for judgment* on the notes. *We have no original jurisdiction of these demands.*"

Keeping in mind the two recognized rules underlying the foregoing decisions, (1) that in case the plea of no cause of action is overruled the defendant is entitled to file an answer and offer evidence *in his behalf*, and (2) that while the plea admits, for the purposes of the trial and decision of same, that the allegations of the plaintiffs' petition are true, yet when the same is overruled by the court it does not become seized of *jurisdiction of the merits* until after answer filed or issue is joined. Consequently, if on appeal from a judgment sustaining a plea of no cause of action same is annulled and reversed, the appellate court *can not deprive the defendant of his rights to answer and introduce evidence*, nor *can it acquire original jurisdiction of the merits*.

And it is with due respect to the opinion of our learned brothers of the Circuit Court that we submit that their judgment has done both, if it is to be maintained.

In our opinion the question here presented is not one involving the correctness, regularity or integrity of respondents' judgment as such, but their right to render *any* judgment on the *merits* of the cause for or against either party to the suit, in the condition of the cause then before them.

There is certainly to be found no support for the position of the respondents in Jennings vs. Vickers, 31 An. 679.

On reason and authority it seems evident that the proceedings in the respondent's court are wholly void, and same should be annulled and avoided, and respondents should be directed to try the case anew in conformity with the provisions of the law.

It is therefore ordered, adjudged and decreed that the writ of certiorari be made absolute, and that the proceedings of the respondents be annulled and avoided, and that the respondents be commanded to try the case anew in accordance with the provisions of the law.

Rehearing refused.

No. 11,312.

THE STATE OF LOUISIANA VS. BEN SCHEXNEIDER.

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If during the pendency of an appeal from a judgment of forfeiture on an appearance bond the defendant is convicted and sentenced, the surety on the bond is entitled to be discharged.

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APPEAL from the Eleventh District Court, Parish of St. Landry. *Perrault, J.*

M. J. Cunningham, Attorney General, and *E. B. DuBuisson*, District Attorney, for the State, Appellee.

Laurent Dupré and *C. W. DuRoy* for E. P. Veazie, Surety, Appellant.

The opinion of the court was delivered by

MCENERY, J. The accused was indicted for horse stealing. He gave bond for his appearance. This bond was forfeited. On the last day of the term at which he was to appear he was surrendered by the surety on his bond.

The surety took a rule on the district attorney to show cause why the forfeiture should not be set aside. The rule was discharged. The surety appealed.

Pending this appeal the defendant was convicted and is now serving the sentence imposed upon him at hard labor.

This fact appears from the certificate of the trial judge filed in this case.

The judgment appealed from must therefore be reversed. Lafleur vs. Mouton, 8 An. 489; State vs. Hamill, 6 An. 259.

It is therefore ordered, adjudged and decreed that the judgment appealed from be annulled, avoided and reversed, and the surety on the appearance bond be discharged.

No. 11,333.

THE STATE OF LOUISIANA VS. JEAN CARREAU ET ALS.

A justice of the peace has no jurisdiction over a municipal ordinance to enforce a penalty by fine or imprisonment for its violation.

Where a justice of the peace illegally imposes the penalty as a police magistrate, the remedy to correct his illegal act is by invoking the supervisory jurisdiction of this court, and not by appeal.

APPEAL from the First Justice's Court, Parish of St. Bernard.

Frank McGloin for the Board of Health, Plaintiff and Appellee.

G. V. Soniat for Defendants and Appellants.

The opinion of the court was delivered by

MCENERY, J. The police jury of St. Bernard passed a health ordinance relating to the slaughtering of cattle in that parish. The penalty for violating the ordinance is a fine of $25, and in default of the payment of the fine imprisonment in the parish jail for not more than thirty days.

The defendants were arrested on a warrant issued on an affidavit charging defendants with the violation of said ordinance, and were convicted and sentenced to pay a fine, and in default of paying the same to be imprisoned in the parish jail.

The defendants filed several pleas in the course of the trial, and put at issue the legality and constitutionality of said ordinance.

Their defence being overruled, on conviction they appealed to this court under Art. 81 of the Contstitution. This article grants the right

of appeal to this court in all cases in which the constitutionality or legality of any tax, toll or import whatever, or of any fine, forfeiture or penalty imposed by a municipal corporation, shall be in contestation, whatever may be the amount thereof.

This article contemplates that the appeal shall be from a court having jurisdiction of the municipal ordinance imposing the penalty, and in a proceeding in which the constitutionality or legality of the ordinance can be presented.

In this case it is evident that the justice of the peace who issued the warrant on affidavit charging the defendants with a violation of said ordinance, and who tried the case and imposed the penalty, had no jurisdiction of the matter.

It was not a civil proceeding to collect a fine imposed by the police jury of St. Bernard parish, but it was a summary proceeding to enforce a penalty under police regulations.

He acted in the capacity of police magistrate, and entertained jurisdiction in a case not conferred on justices of the peace by the Legislature. Board of Health vs. Nunez, 45 An. 205.

To make the case appear more clear we will suppose that the Civil District Court, Orleans parish, should attempt to enforce a city ordinance for an infraction of a police regulation, and the defendant should plead the illegality and unconstitutionality of the ordinance. He certainly could not appeal from the judgment. His remedy would be to invoke the supervisory jurisdiction of this court by application for writs of certiorari and prohibition.

In the instant case we have no hesitancy in saying that the justice of the peace usurped a jurisdiction, and the remedy to correct his illegal acts should have been by timely application for necessary and appropriate writs to this court. The appeal is therefore dismissed.

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No. 11,231.

ERNEST DUB. LUKIS VS. CHAS. J. ALLEN.

The preparation of a petition in its mechanical arrangement is left to the taste of the attorney.

The only requisite for it is that it be a written or printed document, prepared in accordance with Arts. 171, 172, Code of Practice.

If for convenience, and as a matter of taste, the attorney uses a green blank form of a petition as a part of it, on which is printed the address to the court, and typewriting on white sheets for the other part, both fastened or pasted together so that the green blank form is the last sheet, but so arranged that the printed address appears above the typewriting, and the whole thus arranged is a logical statement of the cause of action, it is a compliance with Arts. 171, 172, Code of Practice.

The caption or address to the court is an essential part of the petition, and it can not be omitted in the copy served on the defendant.

The service of citation will not cure this defect.

APPEAL from the Civil District Court for the Parish of Orleans. *Théard, J.*

Harry H. Hall for Plaintiff and Appellant.

Carroll & Carroll for Defendant and Appellee.

The opinion of the court was delivered by

McENERY, J. The plaintiff filed a suit against the defendant, and the petition was made up of a part of the blank form for a petition, and the other in typewriting. The blank form, which also served for an outside wrapper, had the caption in printing: "To the Honorable the Judges of the Civil District Court for the parish of Orleans."

Immediately under and following this caption or address to the court the typewritten part of the petition commenced:

"The petition of Ernest DuB. Lukis, who resides in London, with respect represents," etc.

The typewritten and blank form parts were at the upper ends of the sheets pasted together, so that the printed part on the last sheet (blank form) projected above the typewritten sheets, so that the reading of the petition from the printed portion of the blank could be pursued without interruption to its conclusion.

On the blank form there were the words which usually follow the address of the court, but they were omitted and excluded from the petition. They were meaningless, as they formed no part of the petition. Nothing in a petition not preceding the signature forms any part of it.

The copy of the petition served on the defendant omitted the address to the court.

The defendants filed exceptions to the petition: (1) That the petition was not properly addressed to the court; (2) that the copy served on him was not an exact and faithful copy; (3) that if these exceptions were overruled the petition disclosed no cause of action.

The district judge sustained the last. Plaintiff appealed.

The defendant contends that the address was on the outside wrapper of the petition, and was not therefore a part of the petition. Usually there is no wrapper, the last sheet of the petition serving for this purpose, on which the filing is endorsed. The sheets of paper on which the petition is written can be and often are fastened or pasted together. The preparation of the petition in its mechanical arrangement is left to the taste of the attorney.

It can be fancy, on green paper, or on white and green, so arranged as to alternate in colors, if so desired. The only requisite for it is that it be a written or printed document, prepared in accordance with Arts. 171 and 172, Code of Practice.

If for convenience and as a matter of taste, as we presume it was done in this case, the attorney used a green blank form for a part of the petition, and white sheets with typewriting for the other, and pasted them together so that the blank form containing the address should project above the white sheets and typewritten parts, we can find no reasonable objection to the arrangement. The petition thus arranged in this case contains all the requirements of Arts. 171 and 172, Code of Practice, in consecutive and logical order.

The copy of the petition served on the defendant omitted the address to the court. Art. 172, Code of Practice, requires that the petition must mention the name or title of the court to which it is addressed, and this is essential to the validity of the petition, which is admitted by plaintiff's attorney in his earnest effort to maintain the caption of the petition in this case. Art. 175, Code of Practice, requires the clerk of court to make out an exact and faithful copy of the petition to be served on the defendant. But the plaintiff contends that the citation served with the petition cured the defect of the omission in the petition of the address to the court, as the citation contains the name or title of the court, names and residence of both plaintiff and defendant. This seems reasonable, but Art. 178, Code of Practice, requires a copy of the petition to be annexed to the citation. This copy must be such as is required by Art. 175, Code of Practice. The address to the court is an essential part of

the petition and its omission can not be excused in the copy served on the defendant.

The plaintiff's suit, of course, can not be dismissed for the failure of the clerk to make a true copy of the petition to be served on the defendant. He is entitled to delay for the service of same.

It is therefore ordered, adjudged and decreed that the judgment appealed from be avoided and reversed, and it is now ordered that this case be remanded to be proceeded with according to law and the views herein expressed, defendant to pay costs of appeal.

Fenner, J., dissents.

OPINION BY BREAUX, J.

In the exception to plaintiff's action for the avoidance of a sale on the ground of misrepresentation and failure of consideration, the defendant's grounds are threefold:

1. That the petition is not addressed to the court.

2. That the copy served upon him is not a true copy of the petition.

3. That the petition discloses no cause of action.

The petition is addressed to the court in print on a separate sheet of a different color than that on which the petition is typewritten.

The petition was pasted on the printed cover just below the caption, which reads: "To the Honorable the Judges of the Civil District Court for the parish of Orleans."

On the reverse of the wrapper is the usual endorsement: the court, the title of the suit, the name of the attorney and the date of filing.

The petition and the caption are united with mucilage, making the two a sufficiently plain document.

The clerk failed to copy the caption of the petition.

We have stated the grounds of the exception without reference to the alternative pleas.

The last, that relating to the cause of action, is pleaded in the alternative.

After stating the first and second grounds and following them with a prayer for the dismissal of the suit, the plaintiff in exception adds that should they be overruled, and not otherwise, reserving the benefit of the exception: the petition discloses no cause of action.

This differences the case from those cases holding that want of

citation is waived by defendant, who appears for any other purpose than to plead the want of citation.

The article of the Code of Practice requires "mention of the name or title of the court to which it is addressed," and that a true and faithful copy of the petition shall be served upon the defendant.

The copy served does not contain the caption required.

A distinction is maintained in jurisprudence between the technical sufficiency of a citation as a basis for the maintenance of a judgment and its sufficiency for the purpose of interrupting prescription. Satterly vs. Morgan, 33 An. 848.

The question comes before us on an objection made *in limine*.

We adhere to our previous ruling that another service should have been ordered.

In remanding the case for further service no question arises regarding the effect of the service as heretofore made.

No. 11,342.

THE STATE OF LOUISIANA VS. ALCIDE JACQUES.

. One of the general rules of criminal pleading is that a count should contain but one substantive charge. An exception to the rule is where one offence includes another, and the former could not be charged without also charging the latter. In such a case the defendant may be convicted of either offence, provided always the allegations are sufficient.

2. If a pleader, in drawing up a charge under a statute, so enlarges upon it as to unnecessarily bring within the allegations, in one count, an adequate technical charge for another offence under another statute, the count is bad for duplicity.

3. The offence of cutting and stabbing under Act 44 of 1890 is contained in the similar offence under Act 43 of 1890.

4. The offence of inflicting a wound less than mayhem, under Sec. 794 R. S., amended by Act 17 of 1888, is not contained in the offences under Act 43 of 1890.

. The permissible joinder of cognate offences in different counts of the same indictment affords all the scope needful to present a change under its different aspects.

APPEAL from the Eleventh District Court, Parish of St. Landry. *Perrault, J.*

M. J. Cunningham, Attorney General, and *E. B. DuBuisson*, District Attorney, for the State, Appellee.

E. P. Veazie for Defendant and Appellant.

The opinion of the court was delivered by

PARLANGE, J. The defendant was prosecuted under an information charging him with cutting and stabbing with a dangerous weapon, under Section 791 of the Revised Statutes, as amended by Act 43 of 1890. The jury found him guilty under Act 44 of 1890, which provides punishment for "whoever shall shoot, stab, cut, strike or thrust any person with a dangerous weapon with intent to kill."

The district judge charged the jury that five verdicts might be found, to-wit: 1. Guilty, as charged; 2. Guilty under Act 44 of 1890; 3. Guilty of assault and battery; 4. Guilty of assault; 5. Not guilty. The defendant did not then ask for additional charges. The jury, after deliberating, returned into court with the following verdict: "We the jury find the defendant guilty with intent to commit manslaughter."

The district judge then informed the jury "that the verdict thus rendered was ambiguous and not stated with legal certainty," and after further charging the jury as to the legal meaning and intent of Section 791 of the Revised Statutes and of Act 44 of 1890, he remanded them back to the jury room for further deliberation and finding. At this stage of the proceedings the defendant's counsel requested the court to further charge the jury that, if the evidence warranted, they could find a verdict under the following statutes, to-wit: 1. Section 794, Revised Statutes, for inflicting a wound less than mayhem with a dangerous weapon, or with intent to kill; 2. Section 796, Revised Statutes, for assault and battery; 3. Section 797, Revised Statutes, for assault. The district judge refused the additional charges. The jury retired a second time, deliberated anew and returned a verdict of guilty under Act 44 of 1890.

The defendant's counsel reserved a bill of exception to the refusal of the district judge to charge as he was asked, and the defendant having been sentenced to imprisonment in the State penitentiary for the term of eight months, he has appealed.

The defendant did not move for a new trial, nor did he move in arrest of judgment. No brief on his behalf has been filed in this court, and no assignment of errors has been made.

We are not concerned with the refusal of the district judge to charge a second time that verdicts of assault and battery and of simple assault were receivable under the information. Whether the

defendant was entitled to such a charge or not, he had the benefit of it and will not be heard to complain that the district judge refused to reiterate the charge.

The point in the case is whether the defendant was entitled to a charge that a verdict could be lawfully returned under Sec. 794 R. S.

One of the general rules of criminal pleading is that a count of an indictment or information must contain but one substantive charge; and a count charging two or more distinct offences is bad for duplicity. There are exceptions to the rule, one of which is that when an offence necessarily includes another, and when the major offence can not be charged without also setting out the minor, a count in such a case, charging both offences, is not bad. The rationale of this exception is obvious. If the exception did not exist, it would be impossible to frame a valid indictment for an offence whenever the allegations required to charge it also described another offence. But when, without necessity, the pleader so enlarges upon a criminal statute as to bring within his charge under that statute another offence denounced by another statute, the count is bad.

When the charge for the major offence necessarily includes a charge for the minor, a verdict as to either is responsive, provided always that all the necessary allegations to charge the minor offence are pleaded in the indictment or information.

Applying these principles to the instant case it is evident that a verdict of "cutting and stabbing with intent to kill," under Act 44 of 1890, is clearly responsive to a charge of "cutting and stabbing with intent to kill and murder," under Act 43 of 1890, amending Sec. 791 R. S. The offence denounced by the former act necessarily contains the offence denounced by the latter, and the information in the instant case necessarily contains all the required allegations for a charge under either act.

But a charge of "cutting and stabbing with a dangerous weapon with intent to kill and murder" does not contain the averment requisite for a charge of "inflicting a wound less than mayhem with a dangerous weapon" under Sec. 794 R. S. as amended. This court has held that it is essential in an indictment under Sec. 794 R. S. to allege the inflicting of a wound less than mayhem, or words of equal import. Jackson's case, 43 An. 183; and see Pratt's case, 10 An.

191; John's case, 32 An. 812; Parker's case, 42 An. 973; Day's case, 37 An. 785.

A criminal pleader who, in drawing up a charge under Sec. 791 R. S., would so enlarge upon it as to unnecessarily bring within the allegations of the indictment an adequate technical charge under Sec. 794 would produce a count which would be bad for duplicity.

The joining of two or more charges in one count is not to be allowed, unless it be done under one of the well recognized exceptions to the general rule stated. Duplicity is calculated to complicate criminal procedure without benefit or reason, and to confuse juries. It may hamper the prosecution or prove unfair to the defence.

The permissible joinder of cognate offences in different counts of the same indictment, under well established rules, affords to the criminal pleader all the scope which is needful to present a charge under different aspects so as to provide for variances between proofs and allegations, for the views of the court as to the particular accusation which will be borne out by a criminal transaction and for the misapprehension of the guilty act by the jurors, if it be presented to them only under one of its forms.

The district judge states that when the jury returned into court the first time it was evident to him that their intention was to find a verdict under Act 44 of 1890, and that he therefore charged them anew as to Acts 43 and 44 of 1890. We concur with the district judge in his opinion as to the intention of the jury. But whatever their intention may have been, the district judge did not err in refusing the irresponsive and ambiguous verdict, nor in recharging them as he did, nor in refusing to charge them that they might return a verdict under Section 794, Revised Statutes. Such a verdict would not have been responsive.

We find no error; therefore it is ordered that the judgment appealed from be affirmed.

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No. 11,372.

THE STATE OF LOUISIANA VS. JAMES HENRY JONES.

An indictment for murder is fatally bad which charges that two persons "in and upon one C. D. unlawfully, wilfully, feloniously and of *his* malice aforethought did make an assault on him, the said C. D., unlawfully, feloniously and of *his* malice aforethought did then and there kill and murder.

State vs. Jones.

APPEAL from the Nineteenth District Court, Parish of Iberia. *Voorhies, J.*

M. J. Cunningham, Attorney General, and *R. F. Broussard*, District Attorney, for the State, Appellee.

Todd & Todd for Defendant and Appellant.

The opinion of the court was delivered by

PARLANGE, J. The defendant, James Henry Jones, has been tried for murder, convicted and sentenced to death. He appeals. He has excepted as follows: to the refusal of the district judge to give certain charges to the trial jury; to the overruling of a motion for a new trial; to the refusal of the district judge to grant his counsel a delay to prepare a motion in arrest of judgment; and to an order which the district judge caused to be entered *nunc pro tunc* on the minutes of his court, showing that on a previous day the indictment had been amended on motion of the district attorney, by inserting therein the surname of the defendant. The defendant moved unavailingly in arrest of judgment. He has filed an assignment of errors in this court.

The indictment contains two counts. The first count reads as follows:

"That one James Henry Jones and Albert Spencer, both of the parish of Iberia aforesaid, on the 2d day of the month of March, in the year 1892 of our Lord, with force and arms at the parish of Iberia aforesaid, in and upon one Chas. Deblanc, in the peace of the State then and there being unlawfully, wilfully, feloniously and of his malice aforethought did make an assault on him, the said Chas. Deblanc, unlawfully, feloniously and of his malice aforethought did then and there kill and murder."

The second count charges three certain other persons with having, before and after the committing of said crime, counseled, procured and commanded the two defendants named in the first count, to commit said crime.

It is firmly settled that malice aforethought must be specially charged in an indictment for murder. See Green's case, 42 An. 644. In that case this court sustained a motion in arrest of judgment be-

cause an indictment for murder charged malice *aforesaid* instead of malice *aforethought*. In Williams' case, 37 An. 776, this court held that an indictment for murder was fatally defective for omitting to charge that the murder was committed "wilfully," although it did charge that the defendant feloniously and of his malice aforethought killed and murdered the deceased.

"In an indictment for murder it must be alleged that the offence was committed of the defendant's malice aforethought, words which can not be supplied by the aid of any other." Wharton, Cr. Pl. and Prac., Sec. 258.

The act of 1855 reduced the common law indictment for murder to a mere skeleton. It provided the simple requirement of charging "that the defendant did feloniously, wilfully and of his malice aforethought, kill and murder the deceased." It would seem that even an extreme advocate of the simplification of criminal pleading would be satisfied, when comparing an indictment for murder as required by the common law with the requirement of the act of 1855. It is difficult to see how that act could have required less. This court has held that in prosecution for murder nothing less than the form of charge stated in the act of 1855 is sufficient.

It is elementary that an indictment must be clear and specific, that it must charge all the essentials of a crime, and that as to essentials nothing can be taken by intendment. This doctrine is applied with greater strictness in capital cases.

Does the indictment in the instant case charge distinctly that the defendant Jones did "feloniously, wilfully and of his malice aforethought, kill and murder" a human being?

The indictment charges that the defendant Jones and another person, in and upon one Chas. Deblanc, "unlawfully, wilfully and of *his* malice aforethought, did make an assault on him, the said Chas. Deblanc, unlawfully, feloniously and of *his* malice aforethought, did then and there kill and murder."

According to the rules of grammar the word *his*, in both of the instances in which it is used as above shown, would refer to the nearest antecedent, to-wit: the deceased. Even if we apply the principle "that the relative must be referred to that antecedent to which the tenor of the instrument and the principles of law require that it should relate, whether exactly according to the rules of syntax or not," we would still be confronted with a grave difficulty,

since the words "of *his* malice aforethought" would then relate not to one but to two persons apparently charged.

"By Hawkins it is deemed 'that an indictment against two or more, laying the fact charged against them in the singular, is insufficient.'" Bishop, Cr. Pro., Vol. 1, Sec. 349.

Are we to say which of the two persons apparently charged with the murder acted of malice aforethought? Are we to hold that it was Jones who so acted and not his co-defendant? Besides, does the indictment state with the clearness required in a prosecution for a capital offence, who committed the murder? The pleader intended to charge an assault culminating in murder.

The assault is set out in the averment that Jones and Spencer "in and upon one Chas. Deblanc * * * unlawfully, feloniously and of his malice aforethought, did make an assault on him, the said Chas. Deblanc;" and the murder was intended to be charged by what follows immediately without any connecting link with the preceding language, to-wit: "unlawfully, feloniously and of his malice aforethought did then and there kill and murder." This charge of murder is bad; first, because of the averment of malice in the singular; second, because of the omission of the word "wilfully;" and finally, because it seems that more clearness is required in charging who the perpetrators of a murder are, and in setting out who the victim was. However, the defect in charging malice is clearly sufficient to vitiate the indictment. It is fatally bad, and upon it capital punishment can not be lawfully inflicted.

We deem it unnecessary to pass upon defendant's other complaints.

It is therefore ordered, adjudged and decreed that the verdict, sentence and judgment appealed from be and the same are hereby reversed, avoided and set aside; that this cause be remanded to the lower court, and that the defendant remain in custody to await the further orders or proceedings of the lower court.

No. 10,680.

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ERNEST J. SMITH VS. MISS LIZZIE LEWIS.

Where the plaintiff in an hypothecary action against a third possessor of mortgaged property declares (as his instrument of attack) upon a judgment which by its terms decrees no interest, the blow inflicted is gauged by and corresponds with the weapon used. A judgment of the character mentioned does

not carry with it, as such, interest against the third possessor. If interest could under any circumstances be claimed by the holder of such a judgment, it would arise, not from the judgment itself *proprio vigore*, but from extrinsic facts.

The recording of a judgment in favor of a ward against his tutrix, which is silent as to any mortgage securing payment of such judgment, and which contains nothing to show the name of the tutrix nor the date of tutorship, is not a legal compliance with the law of registry; and though the judgment may still be alive, the mortgage which secured it originally has ceased to exist if the inscription of the legal mortgage of the ward has perempted.

APPEAL from the Nineteenth Judicial District Court, Parish of St. Mary. *Beattie, J.*, acting in place of judge recused.

D. Caffery & Son for Plaintiff and Appellee.

Foster & Mentz for Defendant and Appellant.

The opinion of the court was delivered by

WATKINS, J. This is an hypothecary action in the ordinary form, for the recognition and enforcement of a legal mortgage, *resulting* from the registry of an abstract of the inventory of the succession of Simeon Smith, father of the plaintiff, on the 12th of December, 1855, against his mother, Arpher M. Smith, who was duly qualified and confirmed natural tutrix, on certain property of the defendant, as a third possessor.

His averment is that upon a *final* statement of accounts of the tutrix, a judgment of homologation was rendered, showing a balance in petitioner's favor of $10,750.85, which bears 5 per cent. per annum interest from the rendition of said judgment—it having, in terms, recognized said mortgage from the date above specified.

After admitting as a credit on said judgment "the amount realized from the succession of Mrs. Arpher M. Smith, deceased (his mother), and the amount received from Homer H. Smith, as third possessor of property covered by his mortgage," he claims there is a balance due him of $8050, with 5 per cent. per annum interest from 1st of December, 1881, which is secured by the legal mortgage operating on the defendant's property.

The defendant urged a plea of discussion, and, in the alternative, certain exceptions, and a plea of prescription, and same having been disposed of, she answered *in extenso;* and on the trial,

judgment was rendered in favor of the plaintiff, recognizing his legal mortgage, enforcing same against defendant's property, as to an undivided one-half interest, and reducing plaintiff's claim to $525.65, with 5 per cent. per annum interest from the 18th of October, 1884. From that judgment both parties have appealed.

In this court the death of the plaintiff has been suggested and the appeal revived in the name of the dative testamentary executrix of the deceased.

The controversies in this litigation are quite analogous, in many respects, to those agitated and decided in Smith vs. Johnson, 35 An. 943, it being a precisely similar action, with same plaintiff, and the object of which was the enforcement of the same mortgage, against the defendant Johnson, as a third possessor of a portion of the property affected thereby; but, on examination of the opinion in that case, we find but one question decided that is involved in this case, and that is the peremption of the mortgage for want of timely reinscription.

For accuracy of statement we will quote from that opinion, same having been filed in evidence:

"The plaintiff, E. J. Smith, was born in 1848. His father, Simeon Smith, died in 1853, and, in the same year, his mother, Mrs. Arpher M. Smith, was confirmed natural tutrix. As required by the Constitution of 1868, and legislation thereunder, the minor's mortgage was recorded by inscription of the abstract of the inventory of the estate of Simeon Smith, on November 9, 1869. At this date plaintiff was of age.

"In 1872 Mrs. Smith filed her account of tutorship to plaintiff, and on December 2, 1872, judgment was rendered homologating her account, giving judgment in favor of the minor against (her as) tutrix, for the sum of $10,734.85, and decreeing that the 'tacit or legal mortgage of said ward on the property of his said tutrix be and the same is hereby recognized to have effect from the date of her confirmation as such tutrix.' The judgment was recorded on August 1, 1873, and reinscribed on August 1, 1881, and the judgment was itself revived in February, 1881.

"The original inscription of the minor's mortgage resulting from the recordation of the abstract of inventory in 1869 was never reinscribed."

That statement of facts is strictly applicable to the present case,

with the exception of one, which is the reinscription of the abstract of inventory, it appearing from an agreed statement of facts that is appended to the transcript, that such reinscription was made in the book of conventional mortgages in 1881—a fact not appearing in the Johnson case. And with the further exception that the judgment of homologation *now* appears to have been duly recorded in book of mortgages on the 17th of December, 1872, instead of on August 1, 1873, as therein stated.

In the brief of the defendant's counsel "the substantial defences" are enumerated, and all others may be considered to have been waived. They may be fairly summarized as follows, viz.:

1. That the judgment homologating the final account of plaintiff's tutrix awards no interest, and it forms *res judicata*.

2. That the claim of the plaintiff does not bear interest, because of the usufruct of his mother on the property of the estate of his deceased father, to the extent of the *community* interest of the deceased.

3. That at the death of plaintiff's mother—which happened in September, 1879—his mortgage ranked all others, and that, at the sale of the property of his succession, the whole of the realty inventoried was adjudicated to him at the price of $5850.

4. That, subsequent to this adjudication, when plaintiff threatened his brother, Homer H. Smith, with an hypothecary action against the portion of the mortgaged property he possessed, he received in compromise of said litigation the sum of $5000, and this sum should be credited upon his judgment.

5. That, *subsequent* to the sale of the property which is herein sought to be rendered liable to plaintiff's mortgage, his mother sold (on the 12th of September, 1872) to one H. H. Broad a portion of the mortgaged property for the sum of $3700, and in that act of sale the plaintiff intervened, and waived and renounced his rights of mortgage; therefore, this sum should be credited on his judgment.

6. That in the suit of plaintiff against Johnson, he realized the sum of $4500, in October, 1884, and that sum should be credited on his judgment.

7. That the mortgage in favor of Beverly C. Smith, against plaintiff's mother as tutrix, is perempted for want of reinscription within the term prescribed by law.

The defendant called in warranty her immediate vendor, Patrick

Byrne, and his vendor, G. G. Walker, and demanded an alternative judgment against the former of $400, and against the latter for $600.

I.

The first question to be determined and disposed of is defendant's plea of *res judicata*, which is raised on the judgment homologating the final account of the tutrix. That judgment is couched in the following terms, viz.:

"It is * * ordered, adjudged and decreed that the said account be homologated and approved in all its parts, and that said Ernest J. Smith do have judgment against and *recover from Mrs. Arpher M. Smith, his tutrix, the sum of $10,734.85*, and that the costs of these proceedings be borne by said ward."

This is followed by the paragraph that is quoted from the Johnson case, and the date and signature of the judge follows it.

There is nothing said about interest in the brief statement of accounts which the tutrix furnished to the plaintiff subsequent to his majority. No mention is made of interest in the petition of the tutrix, which accompanied her account when it was filed and homologated.

The contention of defendant's counsel is, that "the judgment homologating the final account of a tutor is a final judgment; it fixes the rights of the parties; it is for a specific sum; a *fi. fa.* can issue thereon; an appeal can be taken from it; and a judicial mortgage results from its proper registry." Brief, p. 10.

Therefore, he urges that it is controlled by the same rule of interpretation as ordinary money judgments are.

In Succession of Anderson, 33 An. 581, it is stated that "the only serious question involved in this case is one of law, viz.: Whether interest can be collected on a judgment for money, which, by its terms, is silent as to interest;" and on a full and careful consideration of all authorities, from Saul vs. His Creditors, 7 N. S. 437, to Succession of Regan, 12 An. 116, we held that "it was a misfortune which might have been repaired before that judgment became final, but which is now past remedy."

That case was quite recently quoted with approval, and we said: "The conclusions of the court rested on, and were completely justified by, several previous adjudications enforcing similar views."

Insurance Company vs. Harbor Protection Company, 39 An. 585; Schulhoefer vs. City of New Orleans, 40 An. 512.

If the question at issue here is controlled by the jurisprudence applicable to money judgments, the claim of defendant must be maintained.

In Cochran vs. Violet, 37 An. 221, we examined and dealt with the effect of certain judgments homologating annual accounts of tutorship, and held that, under the terms of R. C. C. 356, such judgments are only "*prima facie* evidence of the correctness of the accounts homologated," and said, "they are judgments which can not serve as a basis for executory process, or for a seizure and sale. * * *

"They are entitled to the same weight, nothing more, nothing less, as a voluntary acknowledgment of indebtedness made by the tutrix, at the time, as the judgment would be, that is obtained by a creditor in a succession in process of liquidation, when the administrator has declined to recognize the claim. * * *

"The prescription which extinguishes money judgments does not apply to such judgments, as have a conditional existence only."

Not only so, but we held that judgments homologating such accounts did not affect or interrupt the prescription of four years which runs against a minor in favor of the tutor, in respect to the right of action of the former against the latter, "respecting the acts of the tutorship."

We said: "The prescription runs, whether the tutor has or not, during the minority, rendered an account. His entire omission does not prevent prescription from running. * * *

"Under the plain letter of the law, C. P. 998, the plaintiff ought to have sued his tutrix for a settlement within the four years from his obtaining his majority." R. C. C. (356) 362.

We have quoted from that opinion as a leading case for the purpose of showing fully and clearly the distinction which is taken in the code, as well as in jurisprudence, between judgments which homologate *annual* accounts of tutorships and those homologating *final* accounts, "respecting the acts of the tutorship." And from that distinction necessarily arises the conclusion that the latter class of judgments is final and conclusive as to the tutor and the emancipated minor. And in case the tutor files no final account, and the emancipated minor allows the *utile tempus* to pass, without resorting to an action to compel one, his rights and claims are effectually

barred. This being the proper construction of the articles of the code relating to the different accounts of tutorship, the conclusion appears to be irresistible that the emancipated minor can assert *no claims* against his tutor other than such as are recognized in his final account, and established in the judgment homologating it. Such a judgment has the same effect and binding force of any final judgment.

While it is perfectly true "that the sum which appears to be due by the tutor as the balance of his accounts bears interest *without judicial demand from the day on which the accounts were closed*" (R. C. C. 360), yet the right to *judicially* claim interest is unaffected thereby. The use of the plural noun "accounts" indicates that an *extra*-judicial settlement was meant, and that the date on which those accounts are stated and closed is the one from which interest commences to run, and may be recovered, on proper demand and decree.

But we do not mean to extend this doctrine to judgments simply homologating accounts—even final accounts of tutorship—but where, as in this case, the judgment proceeds beyond a simple homologation, and awards a final and specific money judgment, in favor of an emancipated minor, or one who has attained his majority, against his tutrix, it possesses all the characteristics of other money judgments, and constitutes the absolute measure of liability. If it incorrectly disallowed interest, or failed to allow interest, the only remedy was by new trial, or appeal. The defendant's plea of *res judicata* was good and should have been sustained.

II.

Our conclusions in reference to the defendant's plea of *res judicata* dispenses us from the consideration of the usufruct of plaintiff's mother, as exonerating his estate from the payment of interest to him, as a beneficiary heir of his father, Simeon Smith, deceased.

III.

The third, fourth and sixth grounds of defence, being germane to each other, may be taken together and considered, as they appertain to payments made on the plaintiff's judgment.

(a) In reference to the Johnson suit, it is satisfactorily shown that the plaintiff really collected $3500, and that sum must be applied as

credit on his judgment. The judgment was for the sum of $4500, but during the pendency of a devolutive appeal therefrom, the writ was compromised by the plaintiff accepting $1000 less.

(b) At the probate sale of the property of the succession of Mrs. Arpher M. Smith, the realty was adjudicated to the plaintiff, as purchaser, at the stated price of $5800; one-third in cash and the remainder in one and two years' time. Subsequently, the plaintiff threatened to proceed against his brother, Homer H. Smith—who was at the time administrator of their mother's succession—in the enforcement of his legal mortgage on property in his possession, when a transaction and compromise took place between them, whereby the latter assigned to the former the judgment against the tutrix, in favor of his brother, Beverly C. Smith, for exactly the same amount as that of the plaintiff against her; and of which he, Homer H. Smith, was holder, as collateral security for an indebtedness of Beverly C. Smith to him.

In the same transaction, Homer H. Smith agreed to pay, and the plaintiff to receive, the sum of $5000 in full acquittance of his demands, and therefor to release his mortgage on the property of the former.

This consideration was paid to the plaintiff by surrendering to him the two notes which he had theretofore executed in favor of Homer H. Smith, administrator of Mrs. Arpher M. Smith's succession. The written agreement between the parties states that the judgment of Beverly C. Smith was transferred "subject to certain credits thereon," and that the price of $5000, therein stipulated as the consideration that Homer H. Smith was to pay for the release of plaintiff's mortgage on his property, was "credited as payments on the above described judgments *pro rata*, in the proportion that the respective amounts of said judgments bear to the said sum paid." Now, it appears from the record, that, on the date on which judgment was rendered in favor of Beverly C. Smith, he was paid by his mother the sum of $5996, thus leaving a balance of $4738.55 due him on his judgment of $10,734.55.

But while this agreement was predicated on the basis of $5000, as the whole price Homer H. Smith was to pay for the release of the plaintiff's mortgage, yet it is the price of adjudication to the plaintiff of his mother's succession property, which is the measure of his obligation.

It is manifest that both the $5000 which is stipulated in the agreement, and the $5800, amount of adjudication, can not be allowed as credits on the plaintiff's judgment.

The former was paid and compensated in the settlement of the latter.

Now it appears from the transcript that the Beverly C. Smith's judgment was recorded on the 15th of July, 1873, and never subsequently reinscribed. It is against this legal mortgage that the defendant's plea of peremption is urged. Beverly Smith was of full age in 1872, when he obtained judgment against his tutrix, and, therefore, it was necessary that his mortgage should have been properly reinscribed within ten years from July 15, 1873. Lemille vs. Thompson, 34 An. 1041; Smith vs. Johnson, 34 An. 943.

It was in full force in 1881, when the transaction between the plaintiff and H. H. Smith occurred, though it has since become peremptied.

But the judgment of plaintiff was recorded *prior* to that of Beverly Smith, and was, therefore, superior in rank, and entitled to preference and priority in receiving payment from the proceeds of the common debtor's property; and to it the $5800 should have been applied. Homer H. Smith and the plaintiff could not, by their agreement, otherwise impute those proceeds to the prejudice of the defendant as third possessor.

IV.

Defendant contends that, inasmuch as the plaintiff intervened in an act of sale, made by the tutrix on the 12th of September, 1872, of a part of the mortgaged property, and waived and gratuitously renounced his rights of mortgage therein, the price of $3700 must be credited on his judgment.

But plaintiff's counsel replies that "it is quite certain that there is no credit in favor of the *original* debtor. Can there be any credit in favor of a third possessor? Can there be one claim against the original debtor and another against the third possessor?" Brief, p. 9.

The identical question raised here was decided adversely to the defendant's contention, in Powell vs. Hayes, 31 An. 789; although in that case a *special* mortgage was under consideration, against the enforcement of which discussion is not allowed. In that case the court said:

"Now, the third possessor of mortgaged property is not privy to the contract between the creditor and the original mortgagor. He is not bound for the debt. The creditor has never consented to take him as surety. Without the consent of the creditor no one can become surety of the debtor in a conventional obligation. * * There being no privity between the mortgage creditor and the third possessor, he is under no obligation to preserve his privileges and mortgage against others in order that the third possessor may have subrogation thereto in their entirety. It may be that the third possessor, having an interest in discharging the debt, will, upon payment thereof, be entitled to subrogation to the *then existing* rights of the mortgage creditor."

Article 715 of the Code of Practice provides that the creditor with a general mortgage must proceed against the holder of property subject thereto who has most recently acquired, and, in the inverse order of alienation, to the one who acquired most anciently.

Of course, the rights of all purchasers of parts of the mortgaged property are fixed by their respective acts of conveyance. The one who first acquires a portion could not anticipate that another would purchase a part of the mortgaged property. Certainly there is not and could not be any privity between purchasers at different dates. The one making the first purchase of a part leaves it in the power of another to acquire the remainder; and the one who makes the last purchase buys with full knowledge. Each of these dealings are separate and distinct one from the other.

What reason is there why the legal mortgagee can not intervene in the subsequent act, and renounce his right of mortgage without consideration, and not subject himself to the penalty of having to credit his mortgage debt with the amount of the sale, at the instance of antecedent purchaser? What duty or obligation does the mortgagee owe to the antecedent purchaser who buys without his consent or knowledge? There is none that we can conceive of. The reasoning of the court in Powell vs. Hayes seems to be strictly applicable to a legal mortgage. The only difference which can exist between the legal and conventional mortgage in this respect relates to the plea of discussion; and of which the antecedent purchaser is deprived by the mortgagee's remuneration.

But in this connection it must be observed that under the terms of the Civil Code the plea of discussion of the third possessor is

limited to "property mortgaged for the same debt, *within the possession of the principal debtor.*" Article 3403.

It is the provisions of the Code of Practice alone which extend the right of discussion to *junior* possessors of mortgaged property.

From the fact that the Code of Practice requires of the hypothecary defendant to advance the cost of discussion, it is clear that only a *grace* is extended to him as a senior possessor, and not an obligation imposed on the mortgage creditor.

But the mortgagee's renunciation caused the defendant no injury, because the 3410th article of the Revised Civil Code declares that "the third possessor, who has either discharged the mortgaged debt or relinquished the property mortgaged, or suffered it to be sold under execution, has, according to law, an *action in warranty against the principal debtor.*" (Italics ours.)

So if the purchaser—any purchaser—be ousted by reason of the mortgages resting on the property at time of sale, his recourse is against his vendor and warrantor for reimbursement, and not against the mortgagee, with whom he had nor has any contractual or even *quasi* contractual relations. And what gives force and significance to the quoted article in this connection is the fact that it is found in the chapter of the title appertaining to mortgages, which treats "*of the effect of mortgages against third possessors and of the hypothecary action.*"

We are of opinion that this part of the defendant's demand is not well grounded and must be rejected.

V.

Deducting from the capital of plaintiff's judgment the sums allowed as credits thereon, and we have this statement, viz.:

To amount of plaintiff's judgment	$10,734 55
OR.	
By amount collected on Johnson judgment under compromise	$3,500 00
By amount proceeds of sale of real estate of Mrs. Smith's succession to the plaintiff	$5,800 00—$9,300 00
Balance due on judgment	$1,434 55

For this sum the plaintiff is entitled to judgment, and to this amount the judgment must be amended and increased.

It is therefore ordered, adjudged and decreed that the judgment of the lower court be so amended and increased as to award to the plaintiff and appellant the sum of $1484.55, and that all costs be

deducted from the proceeds of the sale of the hypothecated property.

It is further adjudged and decreed that the judgment appealed from be, in all other respects, affirmed.

ON REHEARING.

NICHOLLS, C. J. Both parties applied for a rehearing in this case.

Plaintiff contends there is error in the judgment herein rendered.

1. In not allowing interest on closed accounts of plaintiff's tutorship from the time the account was closed.

2. In placing the judgment of B. C. Smith behind the judgment of Ernest J. Smith; in not pro-rating the credits on said judgments arising from the sale of the succession property of Mrs. Alpha M. Smith, and in imputing the whole amount of Ernest J. Smith's bid of $5800 on the real estate of said succession as a credit on his judgment exclusively, when in point of fact B. C. Smith's judgment was alive and entitled to share in the proceeds of said sale.

3. In not allowing Homer Smith and E. J. Smith to pro-rate the amounts paid by Homer Smith for his peace in the compromise between him and Ernest Smith as they did—that is, to each judgment pro rata, giving to E. J. Smith's judgment its share of the credit, and to B. C. Smith's judgment its share likewise.

Defendant urges, 1st. "That the judgment of plaintiff should be credited with the sum of $4500 instead of the credit of $3500 allowed by the court; the said $4500 being the sum actually received by plaintiff in the execution of his judgment against W. W. Johnson, on the ground that the defendant having the right to force the discussion of the property of Johnson, and having exercised that right, has also the right to force the plaintiff to apply the proceeds of the property to the payment of his judgment; the right of discussion necessarily carrying the right to force the application of the proceeds of the property discussed."

2. "That the court erred in not crediting the judgment of plaintiff with the sum of $5000, this being the amount received by plaintiff in a notarial act from H. H. Smith on account of his judgment and which plaintiff in a notarial act before George B. Sheppard declares to have been received on said judgment and specially credits the judgment in said act with said sum."

3. "The judgment of plaintiff should be credited with the sum of

$3750, the amount of plaintiff's renunciation in the sale from his tutrix to H. H. Broad."

We have carefully re-examined the record.

The plaintiff, Ernest Smith, and Beverly C. Smith, his brother, were, at the death of their father, minors. Their mother was appointed and qualified as their tutrix. The abstract of inventory in the succession of the father was recorded as required by law on the *9th November, 1869*, and reinscribed August 1, 1881.

On *November 8, 1869*, Beverly Smith obtained a judgment against his tutrix for the sum of $10,748, which was reduced on the day of its rendition, by a partial payment of $5996, to the sum of *four thousand seven hundred* and thirty eight dollars. The amount of the judgment was in liquidation of the rights of Beverly Smith against his mother as his tutrix, and it was secured at that time by the general mortgage on the tutor's property. The failure in the judgment to recognize that fact did not destroy the actually existing mortgage. This judgment was inscribed on 15th July, 1873.

On the 20th December, 1872, Ernest J. Smith obtained a judgment against his tutrix for the sum of $10,734.85, and recognizing that payment of the same was secured by the minor's mortgage.

This judgment was recorded August 1, 1873. and reinscribed August 1, 1881.

It was revived 28th February, 1881, and judgment of revival recorded the same day.

On the 11th September, 1871, Mrs. Alpha M. Smith and Mrs. Ellen Hine sold to H. H. Broad certain property for the price of thirty-seven hundred and fifty dollars. On the next day (12th September, 1871) Ernest Smith and Beverly Smith renounced their mortgage on the property so sold.

Mrs. Alpha Smith died *September 1, 1879*. At the sale of her succession property made on the *5th May, 1880*, Ernest Smith purchased property to the amount of $5800, one-third cash and the balance represented by notes payable in one and two years, with 8 per cent. interest from date.

At that date more than ten years had elapsed from the date of the inscription of the abstract of inventory (*November 9, 1869*), and it had not at that time been *reinscribed;* but Beverly Smith's judgment (which, as we have seen, did not *refer to* or *recognize the minor's mortgage*) was, AS SUCH, alive, and its inscription on *15th July, 1873*, had not perempted.

It appears that on the *27th May, 1869*, Mrs. Alpha M. Smith had sold certain property to another son, Homer H. Smith, on which the mortgages in favor of Ernest and Beverly Smith rested.

The son, on the death of his mother, was appointed administrator of her succession, and in that capacity he had in his possession in 1881 the two notes representing the credit instalments of the purchaser made by Ernest Smith at the succession sale. Having loaned money, or made advances to his brother, Beverly, to an amount of about $1400, the latter had transferred to him by way of collateral security the judgment which he had obtained, as we have said, against his mother and tutrix. Thus matters stood, when Ernest Smith threatening to proceed by way of an hypothecary action against Homer, as third possessor of the property which he had purchased from the tutrix, an act was passed (27th August, 1881) between the parties in which Homer Smith transferred to Ernest the Beverly Smith judgment which he held as collateral, with the obligation assumed on the part of Ernest to hold and save him (Homer) and his property harmless against all claims which could be urged by Beverly.

Ernest Smith having thus become the holder of the two judgments, the act proceeds to recite that Ernest Smith, claiming a mortgage on the property by virtue of the two judgments, declared that "for and in consideration of the sum of $5000, this day to him paid by Homer H. Smith, receipt of which he hereby acknowledges, and which said sum of $5000 is hereby credited as payments on the above described judgments pro rata in the proportion that the respective amounts of said judgments bear to the said sum paid, that he did and does hereby forever abandon, relinquish and declare fully paid, satisfied and extinguished all claims, demands, mortgages, judgments, rights of action, hypothecary rights and all other rights of whatever nature which he may have and hold as the owner and possessor of the said above described judgments bearing upon the above described property, and guaranteeing (as we have above stated) the said Homer H. Smith against harm or eviction on the part of the heirs of Beverly Smith or his assigns from the collateral judgment herein transferred, and the said Homer Smith canceling and surrendering, and delivering the two certain promissory notes, each for the sum of $1933.33\frac{1}{3}$, dated, drawn and signed by Ernest J. Smith on the 5th May, 1880, and payable one in one year and the other in two years after date,

to the order of H. H. Smith, administrator, and conditioned to bear 8 per cent. per annum from date until paid, and the payment thereof secured by a special mortgage and vendor's privilege on the property purchased by said Ernest J. Smith, at the succession sale of the property belonging to the estate of Mrs. Alpha M. Smith, as fully described in the deed of said property from said administrator; the said Ernest J. Smith hereby grants a full and final receipt and discharge to said Homer H. Smith for all claims, demands and actions as the holder and owner of said described judgments which he may have against the said Homer H. Smith as administrator of the succession of Mrs. Alpha Smith, resulting from the sale of the property belonging to said succession made on the 5th May, 1880."

Subsequently to this, Ernest Smith proceeded by an hypothecary action against one Johnson as third possessor of property, subject to his mortgage, and in that action certain property was seized, and on the 30th of August, 1884, sold to a third person for the price of forty-five hundred dollars, which the purchaser paid to the sheriff and the latter to the plaintiff.

The third possessor having taken a devolutive appeal in the premises, the matter was compromised by the plaintiff paying to Johnson $1000 of the purchase price, he actually receiving therefore from the action $3500.

On the 28th November, 1882, the present hypothecary action was instituted against the defendant as third possessor of property claimed to have belonged to Mrs. Alpha Smith during the tutorship, and to be affected by the general mortgage resulting from the tutorship of the plaintiff.

The property was sold by T. D. Hine and Mrs. Alpha Smith on August 22, 1862, to John Walker, by John Walker to G. G. Walker September 22, 1871, by G. G. Walker to Patrick Byrne, August 20, 1874, by Patrick Byrne to Miss Lewis (the defendant) March 22, 1880.

In ascertaining the rights of parties we take as the starting or initial date in our investigations the 27th day of August, 1881, that being the date of the act between the plaintiff, Ernest Smith, and his brother Homer, and in dealing with the judgments of Ernest and Beverly Smith against their mother and tutrix we shall not include interest upon either, as by the terms of neither judgment was interest decreed.

Where the plaintiff in an hypothecary action against a third pos-

sessor of mortgaged property declares as his instrument of attack upon a judgment which, by its terms, decrees no interest, the blow inflicted is gauged by and corresponds with the weapon used.

A judgment of the character mentioned does not carry with it, as such, interest against the third possessor. If interest could under any circumstances be claimed by the holder of such a judgment it would arise, not from the judgment itself *proprio vigore*, but from extrinsic facts.

We are not called on to say whether plaintiff in an hypothecary action would have the right as against a third possessor who absolutely denies all liability, makes no tender and forces plaintiff into a protracted litigation, he himself remaining pending the litigation in possession of property bearing fruits, to claim interest on the judgment from judicial demand, not as resulting directly from the judgment but from the refusal of the third possessor to either surrender the property or pay the debt. It may be that under Articles 3453, 2553 of the Civil Code, plaintiff might be entitled to interest if under such circumstances he claimed interest.

Returning to a consideration of the situation of parties on the 27th day of August, 1881, it will be seen that on that day Ernest Smith *owed as a purchaser* at the sale of the property of his mother's succession the cash portion of that purchase price, nineteen hundred and thirty-three dollars and thirty-three and a third cents, and the amount of his two notes, thirty-eight hundred and sixty-six dollars sixty-six and two-third cents, with interest on this last amount from the 5th May, 1880, to the 27th day of August, 1881. The whole indebtedness at that time, therefore, being six thousand two hundred and five dollars.

Now, at the date of the sale and on the 27th day of August, 1881, Ernest Smith was a judgment creditor to the amount of ten thousand seven hundred and thirty-four dollars, and Beverly Smith was a judgment creditor to the amount of four thousand seven hundred and thirty-eight dollars.

At that date more than ten years had elapsed since the inscription of the abstract of inventory in the matter of the succession of Simeon Smith, the father of the parties; but Beverly Smith had, as we have stated, obtained a judgment against his mother and tutrix, which he had caused to be recorded on the 15th July, 1873, and if the inscription of that judgment had the effect of preserving the

evidence of a general mortgage in favor of Beverly Smith on the property of his tutrix the mortgage had not perempted, but was in full force.

The judgment referred to was as follows:

"In this matter it appearing to the satisfaction of the court that the tutrix had delivered to her ward, Beverly C. Smith, the full and final account of her tutorship on the 1st September, 1869, with the vouchers in support of said account, the receipt of which was duly acknowledged by said Beverly C. Smith, as per his receipt in the record, and no opposition having been filed to the homologation of said account, and the law and the evidence being in favor of said homologation, it is therefore ordered, adjudged and decreed that said account be homologated and approved in all its parts, and that the said Beverly C. Smith do have judgment against his said tutrix for the sum of ten thousand seven hundred and forty-five dollars, subject to such credits as may have been given by said ward to said tutrix before the rendition of the judgment."

It will be noticed that the name of the tutrix is not given in the judgment. The judgment is silent as to any mortgage securing payment of the judgment, and there is nothing in it to show the date of the tutorship. So long as the inscription of the abstract of inventory was not perempted, the indefiniteness of this judgment may perhaps have been cured or supplemented by the recorded abstract, but when the effect of that registry ceased and the rights of parties *quoad* inscription had to rest exclusively on the recorded judgments, a very different condition of things arose. We are of the opinion that the recording of this judgment was not a legal compliance with the law of registry, and that though the judgment may be alive, the mortgage securing it has ceased to exist. This being the case the whole of the price due on the 27th August, 1881, by Ernest Smith (six thousand two hundred and five dollars) resulting from his purchase on the 5th May, 1880, of his mother's succession, was to be credited on his judgment and extinguished as to that extent. The balance due him on his judgment after the application of these proceeds was *four thousand five hundred and twenty nine dollars.*

On the 27th August, 1881, the act to which we have referred between Homer Smith and Ernest Smith was passed. In that act both parties recognized and declared a *payment* of five thousand dollars

by Homer Smith to Ernest Smith, and as resulting therefrom the crediting pro rata of the amounts due that day on the two judgments of Ernest and Beverly. What were the amount of the two judgments at that time? Ernest's judgment had been reduced to *four thousand five hundred and twenty-nine dollars*, whilst Beverly's remained intact and unpaid at the sum of *four thousand seven hundred and thirty-eight dollars*. Waiving all objections which might be urged to the application of the five thousand dollars to the two judgments, and giving effect to the agreement between the parties, we have *to distribute five thousand dollars* between the two judgments according to the amount mentioned—in round numbers twenty-five hundred dollars would be credited on each judgment. Deducting that amount from Ernest Smith's judgment, there would remain a balance due him of *two thousand and twenty-nine dollars*.

In the enforcement of plaintiff's claim against Johnson, $3500 were actually realized and paid over to the plaintiff. This payment extinguished entirely plaintiff's judgment.

Plaintiff very vigorously denies that he has recovered a cent of the $5000 mentioned in the Homer Smith act. It may be that no money passed between the parties, but both considered that Ernest Smith was, through the provisions of that act, benefited to the amount of $5000, and the plaintiff consented to regard the benefit received in the light of a payment to that amount. He may have acted in error of law and unadvisedly, but we are bound to give effect to his contract.

In connection with the act of 27th August, 1881, the fact must not be overlooked that through it Ernest Smith became the holder with control thereof of the Beverly Smith judgment, a fact to which he evidently attached great importance. We can not undertake to say what would be the original rights and obligations of Homer, Beverly and Ernest Smith *inter se* should Beverly pay his indebtedness, reclaim his judgment and stand upon his rights. We have to deal with the rights of parties from the position in which they have themselves placed them at the present time.

For the reasons herein assigned it is ordered, adjudged and decreed that the judgment heretofore rendered herein be set aside, and it is now ordered, adjudged and decreed that there be judgment in favor of defendant against plaintiff rejecting his demand and dismissing his suit with costs in both courts.

Parlange, J., takes no part.

No. 11,117.

ELECTRIC TRACTION COMPANY VS. CITY OF NEW ORLEANS.

1. In case it appears that the capital and machinery of a manufacturing establishment has only been actually employed for a part of a year, and not employed for a part of the year, an assessment for the whole of the year is erroneous.
2. The products of a manufactory being a mere form into which the capital employed in business has temporarily passed, same are exempt from taxation as part of the capital employed in the manufacture.

APPEAL from the Civil District Court for the Parish of Orleans. *Rightor, J.*

Farrar, Jonas & Kruttschnitt for Plaintiff and Appellant.

E. A. O'Sullivan, City Attorney, and *H. C. Cage* for Defendant and Appellee.

The opinion of the court was delivered by

FENNER, J. The plaintiff was at one time engaged in the manufacturing of electric traction cars and of machinery adapted thereto, and its capital, machinery, etc., were, no doubt, exempt from taxation under Art. 207 of the Constitution, which exempts "the capital, machinery and other property employed in the manufacture of" sundry named articles, including "machinery" and "articles of wood." But in March, 1891, the company closed its business and has not since been engaged in any manufacturing business. At the time of closing, it had on hand twenty-three cars which it had manufactured and which remained unsold. In 1892 these cars were assessed for taxation, and the sole question in this case is whether they are exempt under Art. 2 7.

While the business of manufacturing continued, it might well have been claimed that the unsold products were a mere form into which the capital employed in the business had temporarily passed and were therefore exempt as part of the capital employed in the business of manufacturing.

But when the business of manufacturing ceased, we fail to see how these cars, or any other capital, machinery or property which had been employed therein, could be any longer exempt. They are certainly no longer "capital, machinery and property employed in the

manufacture" of anything. The Constitution does not say that "capital, machinery and property" which was *once* employed in manufacture shall be exempt as long as it has not been sold. The title to and motive for an exemption rests on the fact of actual employment in manufacturing. Hardly any one would claim that the land and building formerly employed in the business would be exempt after the business ceased; and we do not see how the machinery or other capital or property could have any greater claim to exemption. They all rest on the same basis, and we are clearly of opinion their exemption ceased with the cessation of their employment in manufacturing.

It is to be borne in mind that these cars were never exempt because of their being manufactured products; if they had been, the exemption might continue until they had been disposed of. But they had no claim to exemption, except on the ground that they were a part of the capital employed in manufacturing. When the business of manufacturing ceased, there was no longer any capital so employed, and these cars, like the rest of the capital, property and machinery, lost their exemption and passed into the domain of taxable property.

It is therefore adjudged and decreed that the judgment appealed from be avoided and reversed, and that there be judgment against the plaintiff and in favor of defendant dissolving the injunction and rejecting plaintiff's demand at its cost in both courts.

ON REHEARING.

WATKINS, J. In our original opinion it is erroneously stated that assessment complained of was made in the year 1892—the suppression of the plaintiff's business having occurred in March, 1891. This error was possibly superinduced by a statement to that effect which appears in the city attorney's brief—the averment of plaintiff's petition being that the property that is alleged to be exempt was assessed for taxes during the year 1891.

On theory of our opinion the unsold products of plaintiff's manufacture, being "a mere form into which the capital employed in business had temporarily passed, were therefore exempt, as part of the capital employed in the business of manufacturing;" at least so long as the *employment* continued. Therefore, inasmuch as the business of manufacturing cars ceased only in the month of March, 1891, the xemption continued to that date at least.

Consequently we have a question of tax exemption that is *res nova* —liability for taxes existing for one portionof the year 1891, and the property being exempt for a portion of the year. There is no means of determining such a question provided by the law. But, inasmuch as it appears from the record that the plaintiff used diligent efforts, immediately subsequent to the suspension of its business, to dispose of the cars, we think it but just and reasonable that the exemption of same should be extended to the remainder of the year 1891.

Certainly an assessment of this property for the year 1890 was erroneous, and a portion of the year 1891; and we think under the circumstances of this case the ends of justice would be best subserved by sustaining the exemption and perpetuating the plaintiff's injunction. This conclusion results necessarily in overruling our former decree—though not changing the principles of law announced in the opinion.

It is therefore ordered, adjudged and decreed that the judgment and decree heretofore rendered be set aside and annulled; and it is now ordered and decreed that the judgment appealed from be affirmed.

No. 11,255.

JOHN FITZPATRICK, MAYOR, ETC., VS. D. S. GASTER, SUPERINTENDENT OF POLICE.

1. Section 6 of Act 63 of 1888 authorizes the police board of the city of New Orleans to appoint a superintendent of police and other subordinate officers of the force, and, *with the sanction of the mayor*, to promulgate all rules, regulations and orders to the police force through the superintendent.
2. Section 16 thereof provides that the police board, in furtherance of the police government, and for promoting and perfecting the police discipline of officers and subordinates of the police force, are empowered *in their discretion*. to enact, modify and repeal, from time to time, orders, rules and regulations of general discipline.
3. The powers and duties imposed are essentially and altogether different—those of the former relating to general rules governing the force, while those of the latter relate to police government and discipline. Of the latter, the statute has given the police board absolute and discretionary power, entirely free from the sanction and control of the mayor.

APPEAL from the Civil District Court for the Parish of Orleans. *Théard, J.*

E. A. O'Sullivan, City Attorney, for Plaintiff and Appellant.

F. C. Poché and *E. W. Huntington* for Defendant and Appellee:

1. Under Act No. 63 of 1888 the police board created thereby is vested with all "the powers and duties connected with and incident to the police department and police discipline of the city of New Orleans. Sec. 1.
2. The true and clear purport of Act 63 of 1888 is to provide for a complete reorganization of the entire police force of the city of New Orleans, by withdrawing from the Mayor and City Council the power of appointing and controlling the force, and by conferring that power to the police board created by the statute. 41 An. 158.
3. The intent to invest the police board with the exclusive power to organize and manage the police force having been ascertained to be the real object of the statute, it must be followed, though such construction may seem contrary to the letter of some provision or section of the statute. Potter's Dwarris on Statutes, etc., p. 144; 5 N. S. 140; 16 La. 267; 8 N. S. 429; 2 An. 111; 7 An. 65; 9 An. 165; 777; 17 An. 277.
4. The safest means of discovering the true meaning of the law is to ascertain: (1) The reason of the law. (2) Its object. (3) The means of carrying out the object proposed. Dwarris on Statutes, etc., p. 133; 33 An. 709.
5. Statutes must be interpreted according to the intent and meaning, and not always according to the letter. Dwarris on Statutes, p. 144; 30 An. 982; Civil Code, Arts. 16 and 18; 5 An. 516.

The opinion of the court was delivered by

WATKINS, J. This is an appeal from a judgment dissolving an injunction sued out by the mayor of the city of New Orleans, for the purpose of prohibiting the superintendent of police from executing and carrying into effect a certain order of the Police Board of said city, without first procuring the sanction and approval of the mayor.

The case, as stated by the city attorney in his brief, is as follows, viz.:

"On the 25th of January, 1893, the Board of Police Commissioners passed a resolution ordering and commanding the superintendent of police, D. S. Gaster, to remove or change the police officers assigned to the various recorders' courts, under Act No. 90 of 1884, every thirty days. The resolution was duly adopted, but did not receive the sanction of the mayor; on the contrary, the said mayor, believing that to put the said resolution into effect would be detrimental to and destroy the efficiency of the officers detailed to serve at the recorders' courts, protested against the same being put in force. The desire of the mayor was complied with, and the execution of the resolution deferred until the month of March, when an effort was made by the Board of Police Commissioners to put in operation the said resolution. The mayor thereupon applied to the Civil Dis-

trict Court for an injunction to restrain the said Gaster and the members of the Police Board from attempting to execute the order on the grounds that the said order had not, under the provisions contained in *Act 63 of 1888, Sec. 6*, received his sanction, and that the said order would be detrimental to the efficiency of said police force."

The resolution adopted by the Police Board is as follows, viz.:

"That the superintendent of police shall change the patrolmen detailed as court officers in the various recorders' courts every thirty days."

The defence is a general denial, accompanied by the special averment that such a resolution had been by the Police Board duly enacted, and that it was their intention to enforce the provisions thereof without the sanction or consent of the mayor, unless restrained by competent judicial authority.

The question arising under this state of facts is one of law, and it is whether the concurrence of the mayor was essential to the enforcement of said resolution.

The decision of the question depends upon a proper interpretation of Sec. six (6) of Act 63 of 1888, it being the one the plaintiff particularly invokes as authority for his injunction.

On the trial in the court below there was judgment in favor of the defendant, dissolving plaintiff's injunction and rejecting his demands, and he has appealed.

The aforesaid section reads as follows, viz.:

"The said board shall appoint a superintendent, a police surgeon, and as many captains, sergeants, corporals, clerks, operators, patrolmen and doormen, that may be requisite, *and the said board shall, with the sanction of the mayor, promulgate all rules, regulations and orders to the police force, through the superintendent of the police force*, who shall be the executive head of the whole force, and shall have the direction of said police force, subject to rules, regulations and orders of said board; provided, however, that nothing herein shall be construed as to impair, diminish or reduce the power of the mayor as commander in chief of said police force to issue such orders as might be necessary and proper for the preservation of the peace in the city of New Orleans, and promote the efficiency of said force."

The *gravamen* of the controversy rests upon the italicized words of

the statute quoted, viz.: "And the said board shall, with the sanction of the mayor, promulgate all rules, regulations and orders to the police force."

An examination of other provisions of the statute *in pari materia* may well be made before giving an interpretation to those of Sec. 6—same affording an excellent guide in determining the real object the Legislature had in view in its enactment; and pursuing this theory, we find in the police law the further provisions in Sec. 16 that are, apparently, quite pertinent; and as they have been referred to by counsel of both parties, we will quote it in full.

It is as follows, viz.:

SEC. 16. "The said Police Board, in furtherance of the *police government, and for promoting and perfecting the police discipline* of officers and subordinates of the police force, *are empowered in their discretion to enact, modify and repeal from time to time orders, rules and regulations of general discipline*, wherein, in addition to such general provisions as may be deemed expedient by said board, there may be particularly defined, enumerated and distributed, the powers and duties and liabilities of the officers, clerks and members of the police force, and wherein shall be declared the mode of appointment to office, *the manner of discipline and procedure of trial*, and removal from office of said officers; provided, that such laws, ordinances, orders, rules and regulations, forms and mode of procedure, shall not conflict with any of the provisions of this act."

Calling attention to the italicized portions of the latter section, and making a comparison of same with those of Sec. 6, there can be no discrepancy discernible between them; because those of Sec. 6 declare that the police "board shall, with the sanction of mayor, promulgate all rules, regulations and orders to the police force;" and those of Sec. 16 declare that the "police board, in furtherance of the police government, and for promoting and perfecting the police discipline of officers and subordinates of the police force, are empowered *in their discretion to enact, modify and repeal, from time to time, orders, rules and regulations* of general discipline."

Let us then see into which category the resolution in controversy falls.

The resolution simply provides that the superintendent of police shall change the patrolmen detailed as court officers in the various recorders' courts every thirty days.

It seems quite clear that this is not a rule, order or regulation *promulgated to the police force*, such as that contemplated in Sec. 6 of the act, and which seems to contemplate a concurrence on the part of the mayor; but, on the contrary, the aforesaid resolution seems to have had for its direct and specific object the "furtherance of the police government" and the promotion of "the police discipline of officers * * * of the police force" exclusively, as directed by Sec. 16 of the statute; and such a resolution as the police board were "empowered in their discretion to enact, modify or repeal from time to time" as a matter of general discipline.

It seems to have been the manifest purpose of the Legislature to confer on the Board of Police Commissioners authority to adopt and promulgate all general rules, regulations and orders governing the police force generally, *only* with the concurrence of the mayor; but that for the purpose of perfecting the police discipline of officers or subordinates, and for like purposes, the board could excercise their *discretion* unrestricted by the sanction or approval of the mayor.

When the meaning and import of a law can be ascertained from an examination and analysis of its various parts there is no occasion to examine other sources of information; though contemporaneous judicial decisions interpreting it may be examined for the purpose of determining the object and purpose, as well as the reason and spirit of the law.

And pursuing this theory we find this court had occasion, in State ex rel. Nicholls, Governor, vs. Mayor of New Orleans, 41 An. 156, to define what it conceived to be the purpose and object of this police statute, and in the course of their opinion said:

"A careful analysis of the act discloses that its true and clear import is to provide for a complete reorganization of the entire (police) force of the city of New Orleans by withdrawing from the mayor and City Council the power of appointing and controlling the force, and by conferring that power on the police board created by the statute."

And in State ex rel. Denis vs. Mayor, 43 An. 107, the court, again considering this statute, said:

"But it was deemed best for the efficiency of the police service of the city that the police department should be put under control of a police board, and, accordingly, one was created by the Legislature."

The meaning and import, as well as the reason and spirit of the

statute, are thus clearly outlined in those decisions; and the opinion then entertained corresponds with the views now expressed with regard to the particular provisions of Secs. 6 and 16 of the act. If those two sections were found to authorize and require the executive approval and sanction of the mayor, as a condition precedent to the enforcement of any and every order and regulation of the police board, in reference to the police government and the discipline of the officers and subordinates of the police force, the law would prove to be well nigh shorn of its efficacy, and its contemplated purpose and object defeated.

Our learned brother of the District Court, in an exceptionally cogent and well expressed opinion, announced similar reasons for his judgment in favor of the defendant, in which this court concurs.

Judgment affirmed.

Rehearing refused.

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No. 11,337.

ROBERT MURPHY VS. WILLIAM E. MURPHY ET ALS.

No appeal lies from an interlocutory order carrying into effect a final judgment. Said judgment can only be arrested on appeal or by information.

We have no control over a final judgment, and will not entertain an appeal from an interlocutory decree ordering its execution and review the judgment.

The Supreme Court has no appellate jurisdiction over a final judgment fixing the right of parties on property and ordering a partition. It can only notice the mode of partition when brought to its attention in proper proceedings.

APPEAL from the Civil District Court for the Parish of Orleans. *King, J.*

W. S. Benedict and *Robt. J. Dugué* for Plaintiff and Appellant.

Jérome Meunier and *Armand Pilié* for Defendants and Appellees.

The opinion of the court was delivered by

MCENERY, J. This case was on appeal to this court, and the judgment of the lower court affirmed. 45 An.

The parties in the judgment were referred to a notary to effect a partition between them of the proceeds of the property ordered to

be sold. The rights and interests of the parties were fixed by the judgment.

While proceeding to effect the partition the parties disagreed as to their interpretation of the judgment which had been rendered by the Civil District Court and affirmed on appeal. In the process verbal of the notary it is stated, "And thereupon the said Robert Murphy did call upon the said William E. Murphy to furnish a statement of the rents and revenues of said property on Marais street, and of the disbursements attending the administration thereof since 1st January, 1880; and the said Wm. E. Murphy declared that he is unable at present to furnish the said statement, and the said Wm. E. Murphy did thereupon present a statement of costs and charges in said suit of Murphy vs. Murphy which includes the charges of $340, the costs of appeal in said suit, to which item the said Robert Murphy objects, as he declares.

"And the said Wm. E. Murphy further declared that under his interpretation of the judgment aforesaid all the costs of said suit are to be paid by the mass, and that before a partition is made the said costs are to be reimbursed to the parties respectively; that the proceeds of sale of said property on Marais street are to be partitioned between Robert Murphy and Miss Citye Ann Murphy, to whom the said property had been donated; that the said donation is annulled by said judgment in only so far as the rights of said Robert Murphy are concerned, and that the said Wm. Murphy has personally no interest whatever in the proceeds of sale.

"And the said Robert Murphy denying that the said Miss C. A. Murphy has any interest whatever in the present partition, as he declares, and the parties hereto being unable to agree on account of the contestations arising concerning the pretensions set up by them respectively, I, the said notary, have suspended these proceedings, and do hereby refer the said parties herein to the court having jurisdiction."

Plaintiff suggested to the court the process verbal of the notary appointed to effect the partition under the judgment and referred to that part of it above quoted. The court ordered that Wm. E. Murphy show cause why the contention of plaintiff in said partition proceedings should not be complied with. The rule was tried, and the court ordered a statement and account of rent and revenues, and of disbursements attending the administration of the property from 1st

January, 1880, within fifteen days from 7th August, 1893, and ordered that the costs of appeal from the judgment ordering the partition and fixing the rights of the parties on the property, and its proceeds should be paid out of the mass; and that as Miss C. A. Murphy was a party defendant in the partition suit, the donation to her by defendant, W. E. Murphy, was annulled only so far as it purported to affect the right of Robert Murphy as owner of one-half of the property. As to the other one-half interest in the property it is no concern of Robert Murphy or of the court in what manner Wm. E. Murphy, donor, and Miss Murphy, donee, may act.

The plaintiff appealed from this order.

From the above statement of the proceedings in the act of partition, it appears that the court was carrying into execution a final judgment rendered by it. In the course of its execution it placed an interpretation upon it which we can not, under the present stage of the proceedings, notice. No appeal can be taken from the original judgment, as it has once been on appeal and has been affirmed. No appeal can therefore be taken from an interlocutory order carrying into effect this final judgment. 30 An. 229, State ex rel. Elder vs. Judge; 27 An. 708, Whan vs. Irwin; Brodie vs. Executor, 30 An. 177; State ex rel. Remington Paper Co. vs. Judge, 46 An. (just decided).

The respective rights of the parties had been determined by a final judgment, and they can not come here by a second appeal and have the same judgment reviewed. It must be executed according to its terms. If ambiguous, it ought to have been remedied by the appeal. In the instant case there is no room for a doubtful interpretation of the judgment, and the proceedings instituted by plaintiff in his opposition to its execution in the partition proceedings is, in effect, an attack on the judgment of partition, which is not allowed in the proceedings before the notary, who is the ministerial officer of the court. Traverso et als. vs. Row, 11 L. 498.

We have no power over the final judgment, and we can only take notice of the mode of the partition under it when brought to our attention in a proper proceeding. 11 L. 498.

The appeal is dismissed.

No. 11,290

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SUCCESSION OF R. H. SHORT.

OPPOSITIONS TO THE ACCOUNT OF THE EXECUTOR.

Entries on the note of evidence made in the performance of his duty by a public officer in the performance of a duty are *prima facie* evidence of the facts stated.

A claim for taxes was decreed due and ordered carried on the executor's account as a debt of the succession.

The evidence upon which the District Court rendered judgment, in so far as relates to this claim, was not transcribed in the record of appeal.

In the incomplete state of the record, the opposition, in so far as relates to this claim, is dismissed and the rights of opponents reserved.

Where the patient being feeble and in a nervous and delirious state required attention entirely unusual, and the services were skilfully and faithfully rendered.

Where surgical operations were performed and extra time was devoted by the physician in endeavoring to relieve the patient from his sufferings, which were intense—held, that the performance of the operations and the time, in addition to the regular visits were within the scope of the physician's authority.

The testimony of honorable physicians sustain the correctness of the judgment appealed from, in respect to this claim, and the court agrees with the District Court in the reduction made, and that in all other respects the proof fully sustains the charges made.

APPEAL from the Civil District Court for the Parish of Orleans. *Ellis, J.*

Henry C. Miller for the Executor, Appellant.

F. Rivers Richardson for Absent Heirs and Tutor and Curator *ad hoc*.

Bernard McCloskey for Opponent and Appellee.

Geo. W. Flynn, Assistant City Attorney, and *E. A. O'Sullivan*, City Attorney, for the City of New Orleans, Opponent and Appellee.

The opinion of the court was delivered by

BREAUX, J. The executor's account of administration of the succession of the late Robert H. Short was opposed by legatees and creditors of the succession.

The grounds of opposition were considered and decided and the account approved by a judgment of the district court.

The city of New Orleans was one of the opponents, and claimed taxes due for 1883, upon property situated corner of Prytania and Fourth streets.

This claim was allowed by the District Court with interest and costs, but without privilege.

The claim is opposed before this court by the executor and the attorney of absent heirs, who contend that the judgment is erroneous for the reason that the tax lien is prescribed.

They also complain of the court's action in permitting the filing of a document after the evidence had been closed and the case argued and submitted.

In reference to this document the record discloses that at the time the case was submitted, after argument, the court reserved the right to the city to introduce it in evidence.

In accordance with the reservation the document was admitted in evidence.

In the absence of any testimony and of any objection of record, this court presumes that the District Court properly exercised its discretion and admitted the evidence in compliance with the reservation, and after sufficient notice to all parties concerned.

Entries in the note of evidence, made in the performance of his duty by a public officer are *prima facie* evidence of the facts stated.

The claim is for $105.80, balance of taxes for 1883.

The tax bill is not of record.

Without it, to prove that the amount is due, on property in the name of Wormald, of which R. H. Short was the owner, the claim can not be recovered of the latter's succession.

The court *a qua* correctly decided that the title which stood in Wormald's name when the tax of 1883 was assessed had been annulled and that the property belonged to Col. Short, who paid $450.12 on the tax bill of 1883 for $556.

The judgment also decrees that an amount is due to the city of New Orleans for the taxes of 1889 and 1891, with interest and costs secured by privilege.

There is no claim in the opposition of that city for the taxes of those years. The judgment is, in this respect, *ultra petitem*.

The claim of the attending physician, Dr. Joseph Jones, for medical services rendered during the last illness of the late R. H. Short, was carried on the executor's account for $1000, subject to a credit of $500, amount paid on account.

The appellants contend that the amount of the judgment in his favor is excessive, and pray to have it reduced.

Dr. Jones was the family physician and the friend of the deceased.

The patient's condition required careful medical attention.

Operations were performed requiring skill, to alleviate his sufferings.

He made 282 professional visits—there were day visits and night visits—he treated the patient surgically at different times and was detained a number of extra hours (beyond the professional visits necessary) in the administration of medicines and nourishment; the patient refusing to receive them from any other hands than those of his physician.

The professional services rendered and surgical operations performed are detailed in the account sworn to as correct and proved by reference to the *memoranda* of visits and services kept by the physician, proved upon examination, without objection.

The patient was taken ill in January and in April was confined to his bedroom. From April until the date of his death in August, the attendance was constant; from one to twice and three times a day, and oftentimes at night; he was in a feeble and delirious state. There was a complication of diseases, requiring the skilful and faithful attention which was rendered.

Dr. Ike Scott testified that he has been a practising physician over forty years and considers the charges for fourteen operations for prolapsis of the rectum, $140, very reasonable, and that the charges for the other services are reasonable.

He considers the required attention of an hour more than a visit.

Dr. Thomas testifies that he charges $3, and night visits $5, and that for a visit requiring more than thirty minutes he would charge for extra time.

This uncontradicted evidence sustains the correctness of the judgment.

We agree with the district judge in fixing the charges for each visit at $3 instead of $4 as charged, and that in all other respects the proof fully sustains the charges made.

It does not appear that the physician exceeded the scope of his authority in the number of visits he saw proper to make, in the surgical operations performed and the medical attention given to the patient.

In so far as relates to the claim of Frank Stewart, carried on the executor's account for $100, and also opposed by the creditors and legatees, the testimony shows he bought warrants for the deceased, attended to the assessment of his property and gave other attention to his business, for which it is proved that the charge was moderate.

The claim is not stale nor prescribed. They were rendered within three years preceding the death of R. H. Short.

It is therefore ordered, adjudged and decreed that the judgment appealed from be amended by dismissing the claim of the city of New Orleans for the taxes of 1883, $105.12, reserving to this opponent whatever right it may have for recovering this tax.

In reference to the taxes of 1889 and 1891 the account remains unchanged but the judgment is amended so as not to include "the further sum of $467.60, with 10 per cent. per annum interest from August 9, 1891, for the tax of 1891."

As amended the judgment is affirmed.

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No. 11,419.

JAMES A. KOEHL ET AL. VS. JUDGE OF DIVISION B OF CIVIL DISTRICT COURT FOR THE PARISH OF ORLEANS.

Where in a case of alleged nuisance caused by a business apparently lawful, the judge, *ex parte* and *in limine*, improvidently issues an order for an immediate closing up of said business, and the facts alleged and the law do not warran such an order, and the judge, on a rule to show cause, subsequently modifies the order of injunction so that the business may be conducted according to the laws of the State and municipal ordinances, and not otherwise, and so as not to cause a nuisance to the complainants, and forbidding the person complained of from permitting the assembling of disorderly persons at his place of business; and where the facts alleged in the petition for injunction do not show that irreparable injury will result to the complainants from the modified order, the lower judge will not be compelled by mandamus to grant a suspensive appeal from the modified order and the alleged nuisance may be controlled and regulated *pendente lite*, under the modified order.

APPLICATION for Mandamus, Prohibition and Certiorari.

Lazarus, Moore & Luce and *Drolla & Augustin* for the Relators.

E. Howard McCaleb, John Q. Flynn and *W. B. Lancaster* for Respondents.

The opinion of the court was delivered by

PARLANGE, J. The relators presented to the judge of Division A of the Civil District Court for the parish of Orleans, a petition in which they averred substantially that they are citizens, tax-payers and property owners in the radius comprised between Canal, Bourbon, Bienville streets and Exchange alley, in New Orleans; that Otto H. Schoenhausen is the proprietor of a concert hall or variety saloon, situated at the corner of Royal and Customhouse streets, in New Orleans, in which concert hall intoxicating liquors are sold; that said Schoenhausen has no legal permit to operate said concert hall, nor has he complied with the municipal ordinance relative thereto, and especially with Ordinance 7012 C. S. in so far as obtaining from the Mayor and City Council the permission to set up a place where liquors are retailed; that certain stated acts of misconduct and certain improprieties are there permitted, and that the noise which comes from said concert hall is of itself an insupportable nuisance; that all of said acts are contrary to law, and subversive of good order and public morals; that in consequence of the operation of said concert hall respectable persons shun the neighborhood after nightfall, thereby causing considerable damage to the present relators and to other persons conducting restaurants, hotels, stores, etc. They alleged irreparable injury to an amount exceeding $2500 to each; they prayed for an injunction restraining said Schoenhausen from conducting or operating said concert hall.

The judge of Division A of said Civil District Court granted the injunction on a bond of $2000, and the suit was allotted to Division B of said court.

The defendant in the injunction suit excepted that the petition discloses no cause of action, and that the plaintiffs in the suit are without right to stand in judgment and have no authority to represent the State or the city of New Orleans in the premises. The defendant, reserving his exceptions, also answered by a general denial, admitting that he is the owner of the concert saloon in question. He asserted that he had obtained licenses from the city of New Orleans and the State, and a permit from the city of New Orleans prior to the issuance of the injunction; and that therefore said writ could not lawfully issue in advance of trial on the merits to suppress the same as a nuisance. He further asserted that his establishment is situated in that part of New Orleans where such establishments

have existed and been carried on for years without let or hindrance from the plaintiffs or others in the vicinity; that plaintiffs are estopped by their laches, silence and inaction, and that they have damaged him in a large amount by their illegal and malicious action.

Subsequently the present relators filed an amended petition in the injunction suit, in which they averred more in detail their causes of complaint, and alleged more fully the injury to their occupations and to the rental value of their property caused by the operation of the concert hall in the manner they described; and they alleged that the concert hall is not only a common public nuisance but also a private nuisance. They alleged that neither the Legislature nor the city of New Orleans has the power to license or permit the conduct of the immoral establishment described by them, or any immoral establishment, and that any act of the Legislature or ordinance of the city of New Orleans authorizing the licensing of such an establishment is unconstitutional. They attacked specially the constitutionality of any act of the General Assembly licensing a concert saloon in which certain dances are performed. They averred that if the Legislature had the right to license such an establishment, Schoenhausen has not obtained the consent of the majority of the property holders and residents within a radius of 300 feet from said concert hall.

The State, through the Attorney General, intervened in the injunction suit, adopting the averments of the petitions filed by the present relators (except as to private interests), and alleged that said concert hall is a public nuisance, contrary to good morals and public order, and that Schoenhausen has not obtained the consent of a majority of the property owners and residents within a radius of 300 feet.

The lower judge having refused to dissolve the injunction on bond, a rule was issued to the present relators to show cause why the injunction should not be so modified as to permit Schoenhausen to open and carry on his business of concert saloon and bar-room "in conformity to and in obedience to the laws of the State and ordinances of the city of New Orleans and forbidding him from carrying on said business in violation of the laws of the State and the ordinances of the city of New Orleans." In the rule Schoenhausen averred that he had paid his State and city licenses and annexed the same, amounting to $6000, for 1893.

The present relators excepted to this rule, on the ground that it is unauthorized by law and that it is an attempt to anticipate the trial on the merits. The lower judge overruled this exception, and after hearing the rule he modified the injunction by enjoining Schoenhausen "from carrying on his bar-room and concert saloon in any manner violative of the laws of the State or the ordinances of the city of New Orleans, and forbidding him from permitting disorderly persons to congregate therein or otherwise creating a nuisance in his said establishment injurious to the plaintiffs."

In his opinion, on modifying the injunction, the lower judge said substantially that the injunction did not issue as a matter of right under Art. 298, C. P., but under Art. 303, C. P., which vests in the judge a discretion to determine whether the injurious acts set forth entitle a complainant to an injunction; and that as the judge, in cases arising under Art. 303, C. P., has a discretion in allowing or refusing an injunction before trial, he is, in like manner, vested with discretion to modify a preliminary injunction which improvidently issued and is used to deprive a litigant of a legal right to be heard in court or is used to finally decide a case before trial. The lower judge further said that by the charter of the city of New Orleans, Act 20 of 1882, Sec. 8, and the license law of the State, Act 150 of 1890, concert saloons are authorized and licensed and that the Supreme Court has decreed the validity of the acts of the Legislature imposing a license upon those establishments and that those acts have been recognized and enforced by the Supreme Court. He further said that Act 69 of 1888, requiring the consent of a majority of the property owners and residents within a radius of 300 feet from the concert saloon, has been declared null and void at the suit of the Attorney General against McCuen et al., No. 24,711 of the Civil District Court. That the writ should not have issued before trial, closing up said establishment, and that before trial the manner in which the establishment is conducted may be controlled by injunction so as not to cause a nuisance.

The plaintiffs in the injunction suit prayed for a suspensive appeal from the order modifying the injunction, which appeal was refused by the lower judge. Thereupon, the plaintiffs applied to this court for writs of mandamus, prohibition and certiorari.

The lower judge answers the order issued from this court by asserting the validity of his action, substantially for the reasons stated by him on modifying the injunction.

Schoenhausen answers, averring, among other things, that the petition for injunction discloses no irreparable injury; that the amended petition and the intervention of the Attorney General have never been served on him and were filed after his exceptions and answer; that the supplemental petition, changing the issues, should not have been allowed in an injunction suit; that the judge *a quo* had the right to take judicial notice of the suit brought by the State against McCuen et al.; that the bar-room mentioned was established in compliance with Ordinance 7012 and relators' statement to the contrary is false; that, moreover, the State laws licensing concert saloons authorize the carrying on of a bar-room, as appears fully from decisions of the Supreme Court; that by its charter, the city of New Orleans is authorized to suppress all nuisances and its council has express power to close houses for retailing alcoholic liquors when the public safety may require; that a summary process being provided by statute for the abatement of all nuisances by the city, the court should not interfere by injunction; that by the State law, the carrying on of concert saloons and bar-rooms is authorized on payment of a license, which he has paid to the State, as well as another to the city; that said business being legal, can not be abated as a nuisance at the suit of private individuals; that for any injury suffered by the relators in the premises, they have their action in damages, but no right to close up respondent's establishment in advance of the trial on the merits. He quotes statutes and decisions in support of his answer.

In this case, when the petition for injunction was presented to the judge, he might have refused to sign the order closing the establishment, leaving the applicants to seek such remedy as the law might have afforded. Or the judge might originally have granted the order which is now complained of. An *ex parte* order for the issuance of an injunction is not a judgment. If the judge should discover that it improvidently issued, that it was too broad and in excess of his power, it seems that he should have the right to correct his error. State ex rel. Leche, District Attorney, vs. Fowler, 42 An. 147; State ex rel. Waterworks vs. Levy et al., 36 An. 944.

It is urged by the respondent judge that if such a power does not exist a litigant might suffer injury, although the judge whose order was causing the injury might, an instant after rendering it, realize and acknowledge that it was improvident. But it is not necessary

for us to pass on this point to decide the matter presented for adjudication.

This court has held distinctly, and it is settled, that in the matter of the dissolution of an injunction, the allegation of irreparable injury, set out in the petition, is not conclusive. Slaughterhouse Company vs. Police Jury, 32 An. 1192; Orleans Slaughterhouse Company vs. Butchers' Union Slaughterhouse Company, 33 An. 930; Schmidt vs. Foucher, 37 An. 175; State ex rel. Sterken vs. Judge, 37 An. 826; State ex rel. May vs. Davey, 39 An. 992.

The relators sought and obtained, for the time being, the immediate abatement of the alleged nuisance, and they prayed for and obtained a complete reversal of the status of Schoenhausen's business.

This court has held that as a general rule, subject to exceptions, the mandatory writ of injunction will not issue *ex parte* before trial. Black vs. Good Intent Towboat Co., 31 An. 487; Barrett vs. City, 33 An. 544.

This court has also held that a preliminary injunction will not be used to oust a person in possession. N. & N. E. R. R. Co. vs. N. O., Terre Bœufs & Lake R. R. Co., 36 An. 561; State vs. Lyon, 41 An. 952.

Mr. Pomeroy states the equity jurisprudence to be as follows:

"This term (mandatory injunctions) in strictness is confined to interlocutory or preliminary injunctions. Where on the final hearing in a case of nuisance or interference with easements, or continued trespass analogous to trespass, the relief is granted compelling the defendant to remove his obstructions or erections, and to restore the plaintiff to his original condition and thereby to end the wrong, the remedy is in fact an ordinary decree for abatement, and is in no proper sense an injunction of any kind. But in these and similar cases the *preliminary* injunction, while purporting to simply restrain the wrong, and while negative in its terms, may be so framed that it restrains the defendant from permitting his previous wrongful act to operate, and therefore virtually compels him to undo it by removing the obstructions or erections, and by restoring the plaintiff to his former condition. Such an injunction is termed mandatory, and resembles in its effect the restorative interdict of the Roman law. It is used where the injury is immediate, pressing and irreparable, and clearly established by the proofs and not acquiesced in by the

plaintiff; since an order directly compelling an abatement of the nuisance or a removal of the obstruction can not be made upon interlocutory motion. The rule is fully established, at least by the English decisions, and is not controverted by American authority, that in such cases, where the facts are clearly established and the injury is real and the plaintiff acted promptly upon his acquiring knowledge of the defendant's proceeding, a preliminary mandatory injunction may be granted, although the act complained of was fully completed before the suit was commenced. It should be observed, however, that no other equitable remedy is more liable to be defeated by acquiescence or by delay on the plaintiff's part from which acquiescence may be inferred."

Mr. High, in his work on injunctions, says: "Mandatory injunctions are seldom allowed before a final hearing, though they may be granted on interlocutory applications. And while a court of equity is always reluctant to grant a mandatory injunction upon an interlocutory application and before a final hearing, it may yet do so in an extreme case when the right is clearly established and the invasion of the right results in serious injury."

The establishment in question is one of a kind licensed by the law of the State. This court has, in several cases, passed upon matters relative to the licenses imposed upon such establishments. The petition for injunction sets out a considerable volume of matter, *en pais*, as to the manner of conducting the particular establishment in question.

Cases may unquestionably arise in which the courts would have the power to prostrate a nuisance before trial. Yet, when the matter involves the absolute closing up, in advance of any hearing on the merits, of a business apparently authorized by law, it is manifest that the courts will act with caution and only in clear cases. The business of no one would be safe if, upon an *ex parte* charge that it is a nuisance and before he had an opportunity to disprove, a court, without first being satisfied that it was a case requiring an extraordinary remedy, were to close the business.

The case presented, circumstanced as it is, does not appear to us to be such a one as warranted the rendering *in limine* and *ex parte* of a virtual decree of abatement. We distinctly say, however, that we are not to be understood as in any manner expressing or intimating an opinion as to the merits. The question for us now to decide is

whether the modification of the order of injunction will cause irreparable injury to the relators, and whether for that reason they are entitled to a suspensive appeal from that order. We mean only that after considering the facts stated in the petition for injunction, the order modifying the injunction and the law, we are satisfied that no irreparable injury can result to the relators from the order. We do not see how, during the time which will elapse until the case comes to us on appeal, the relators can be irreparably injured by the conduct of the business in accordance with the laws of the State, the ordinances of the city, and so as not to cause a nuisance to the relators. We agree with the district judge that, *pendente lite*, the alleged nuisance may be properly controlled and regulated under the modified order.

The relators are not entitled to the relief sought by them.

The court being of opinion that the relators have not shown sufficient grounds for the allowance of the writs of mandamus, prohibition and certiorari herein prayed for, and that the relators are not entitled to said writs, the application for the same is hereby refused, and the provisional order herein granted is set aside.

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ACCRETION.

See Donations.

APPEAL.

The only issue is whether the relator is entitled to a suspensive appeal from an order appointing a receiver.

The court of the first instance having acted upon the resolution of the company consenting to the appointment of a receiver, a suspensive appeal will not lie from the decree of appointment without proof that the resolution was *ultra vires*, or that it was, in other respects, illegal and improper.

The remedy to correct the alleged illegality in the appointment of a receiver is by rule to set aside and vacate the order of appointment, and, if the rule be denied, to appeal from the decision.

Whether the company consented legally is a question of proof to be considered on the trial of a rule.

State ex rel. Brewing Co. vs. Judge, *p.* 100.

The remedy invoked by relator embodied in Sec. 352 of the Revised Statutes, which, having reference to official bonds, declares that "For the acceptance of the sureties offered upon the bond the assent shall be unanimous, and on refusal to accept any surety, the district or parish judge shall have the power upon application in vacation, as well as in term time, to compel them to show cause why they do not accept such surety; and in all such cases the parties whose duty it is to judge of the sureties offered shall, on demand of the party complaining, certify to the judge their decision and the evidence on which it was based, whose duty it shall be to decide immediately thereon and from his decision in the case there shall be no appeal," though styled in the proceedings a "mandamus," is not strictly such; it is a special statutory remedy expressly authorizing the district judge to review the action of certain officials in respect to a particular matter, and on due and legal cause not having, in his

INCORRECT TORT ERROR.

APPEAL—*Continued.*

opinion, been shown to justify the same, to reverse that action, to pronounce in the case the decision which those officers should have made and to order them to do that which they should have done originally.

The contention that so much of the section as refuses an appeal is unconstitutional in that it is in conflict with Art. 81 of the Constitution which guarantees an appeal in all cases where the matter in dispute is over two thousand dollars, exclusive of interest, is not well founded. Defendant has no pecuniary interest in the litigation and maintains his right of appeal only as a representative of the State and parish. As such he has just such rights and is charged with just such duties as are imposed upon him by the particular statute under which he is acting. The clause objected to, so far as the State and parish are concerned, is not a limitation upon or a denial of the constitutional right of appeal, but the designation of a particular class of cases as to which the Legislature has declared that for the purpose of enabling officers to qualify as such, it is not deemed necessary for the safeguarding of the interests of the State and parish to pursue an investigation as to the sufficiency of the sureties on the bonds tendered by them beyond the action of the district judge. Act No. —, of 1878, authorizing the Governor to direct the institution of suits subsequent to the induction of officers to test the sufficiency of their bonds, guarantees the State and parish against any original mistake in approving and accepting them.

Defendant but for Sec. 352 of the Revised Statutes would have been entitled to appeal. He had the legal right to raise an issue in the lower court as to whether or not that section had been repealed, and whether by such repeal his conclusions as to the solvency of the bonds tendered to him for acceptance were not final and free from revision by the district judge, particularly (as he claimed) under a writ of mandamus, and the lower court having ruled adversely to him, an appeal lies for the determination of those restricted issues.

Section 352 of the Revised Statutes has not been repealed, and under its terms no appeal lies from the decision of the judge upon the merits of the rule.

State ex rel. Bourgeois vs. Police Jury, p. 249.

APPEAL—*Continued.*

An appeal from the judgment of a municipal tribunal to the Supreme Court must involve the constitutionality or legality of some city ordinance, otherwise it is not examinable either as to law or fact. If, however, it presents such a question, both the fact and law of the case are open to examination and decision.

State vs. Dean, p. 441.

An appeal bond that is alone conditioned that appellant shall pay and satisfy such judgment as may be rendered against them is not sufficient. It must contain the additional condition, either in terms or substance, that the appellants shall prosecute their appeal.

Russ & Hollingsworth vs. Their Creditors, p. 442.

A necessary party to an appeal, either as appellee or appellant, is not competent to sign an appeal bond as surety.

Once an appeal bond has been filed the jurisdiction of the lower court ceases and that of this court attaches, and the former is without jurisdiction or authority to permit a supplemental bond to be filed. *Barrow et al. vs. Clack*, p. 478.

An order granting an appeal "on giving bond according to law," and without fixing any amount, can only operate as granting a suspensive appeal.

A bond filed "in the sum of —— hundred dollars" without filling in the blank might, perhaps, be considered as no bond at all; but even if it were considered as a bond for one hundred dollars, the court retained the power to pass on its sufficiency for a suspensive appeal, and on finding it insufficient, to set aside the the suspensive appeal, and then, on application within the delay allowed by law, to grant a devolutive appeal, and appellant, having obtained and complied with such order, is protected in his appeal.

McGuirk vs. Marchand, p .732.

The judgment was signed on plaintiffs' motion, in order that they might exercise their right of appeal.

They did not thereby acquiesce in the judgment.

The motion to dismiss the appeal on the ground of acquiescence is overruled.

Randall vs. Railroad Co., p. 778.

APPEAL—*Continued.*

Where a defendant against whom a judgment has been rendered in the District Court for an amount within the appellate jurisdiction of the Court of Appeals takes an appeal from the judgment returnable to the latter court, and the appellee moves in that court to dismiss the appeal on the ground that the allegations of the petition show a "matter in dispute" within the jurisdiction of the Supreme Court, the Court of Appeals has, for the purposes of a decision on the motion, the right to examine the nature of the cause of action, the pleadings as a whole, and the evidence and course of proceedings in the lower court, and is not restricted to the prayer of the petition.

When from such an examination, reaching the conclusion that allegations were inserted in the petition solely as a pretext to have recourse to the Supreme Court where the true matter in dispute is below its constitutional jurisdiction and within its own, it overrules the motion to dismiss and retains jurisdiction, its action will be sustained on application for writs of prohibition and certiorari where the record shows that had the appeal been brought to the Supreme Court it would have been dismissed *ex proprio motu* for want of jurisdiction.

State ex rel. Abraham vs. Judges, *p.* 883.

When, by subsequent order of court, imperfections in a transcript are cured, a pending motion to dismiss will be overruled as matter of course.

Hughes vs. Murdock et al., *p.* 935.

While we have recognized the practice, in cases of ambiguous jurisdiction, of taking appeals at the same time from District Courts to the Circuit Courts of Appeal and to this court, parties availing themselves of this privilege subject themselves to the risk that if the first appeal shall not be determined by the court in which it is lodged prior to the return of the second appeal, the latter necessarily lapses.

It is a legal impossibility that there can be two appeals, by the same party, from the same judgment, pending at the same time in two different courts.

The Circuit Court to which the first appeal was returned had exclusive authority to determine primarily its jurisdiction over the appeal, and until it has declined jurisdiction or has been denied

APPEAL—*Continued.*

jurisdiction under an appeal to the supervisory jurisdiction of this court the pendency of the appeal is a bar to the prosecution of an appeal, involving the same subject matter, to this court.

Appellees who are held in the Circuit Court under the appeal still pending there, can not be, at the same time, impleaded in this court under the second appeal.

Appeal dismissed without prejudice to right of new appeal in case the Circuit Court shall decline or be denied jurisdiction.

Frieburg & Bro. et al. vs. Langfelder, p. 983.

When a party applies for and obtains two orders of appeal in open court, one to the Circuit Court of Appeals and the other to the Supreme Court, and prosecutes one, which is dismissed for want of jurisdiction, this order being null and void, he can avail himself of the other order for an appeal, and prosecute it in the court having jurisdiction. *Bennett vs. Creditors*, p. 1019.

Defendant is not affected by a declaration in a judgment that it is in his favor when in reality it is against him. He has the right to appeal from it to correct any errors. 8 An. 362; 2 An. 182.

Hewes et als. vs. Baxter, p. 1049.

An appeal bond which is executed by the defendant, in his individual and personal capacity, does not respond to an order of appeal granted in favor of the same person in his fiduciary capacity of administrator of a succession.

An appeal bond in the recitals of which LO mention is made of the suit in which the judgment appealed from was rendered, either by number, title, amount, character or court, specifically, or in substance, does not conform to the requirements of the law.

Were an adverse judgment rendered against the appellant by this court, there would be nothing discoverable on the face of the bond which could connect such decree with the one appealed from, or which would enable the lower court to fix the liability of the sureties of the appellant.

Thibodeaux et als. vs. Thibodeaux, p. 1126.

The right of a defendant to appeal from a judgment which has been rendered and signed against him is not impaired by the fact that without warrant of law the court, on motion of plaintiff, had the judgment set aside and the case reinstated on the docket.

APPEAL—*Continued.*

The court, on appeal from the judgment rendered, having found it based on insufficient evidence, reversed it, but remanded the case for further proceedings. The plaintiff having, after having had the first judgment set aside and the case reinstated on the docket, caused it to be assigned for trial, tried and a second judgment rendered in his favor against defendant without any notice to defendant of these after proceedings, the second judgment is annulled, avoided and reversed.

Florsheim Bros. Co. vs. Williams, p. 1196.

Under Art. 898, Code of Practice, relief will be granted only from the effects of such mistakes, omissions and similar irregularities as arise without fault on part of appellant.

Where the transcript is grossly defective the appeal will be dismissed.

Lewis vs. Boyet, p. 1220.

A judge who refuses to grant an appeal in an appealable case, on the ground that the issues raised had been repeatedly determined by the Supreme Court adversely to the contention of the party moving for the appeal, and that the applicant was through his motion seeking to abuse the right of appeal, acts unjustifiably. He has nothing to do with the motives prompting the exercise of the legal right nor the final result of the controversy.

Though the rulings of a judge in a cause be erroneous he is protected in that cause from liability for resulting costs, from motives of public policy.

State ex rel. Dufard vs. Recorder, p. 1299.

A mandamus proceeding to compel the erasure of tax inscriptions from the mortgage records on the ground that same were improperly assessed involves the *tax* and not the *property;* and in case the amount of the taxes is less than $2000 this court has no jurisdiction *ratione materiæ.*

DeBlois et al. vs. City, p. 1308.

The judgment of the court *a qua* having decreed the cancellation of one of the mortgages contested by third opponent, and this mortgagee not having appealed or filed an answer to the appeal,

APPEAL—*Continued.*

the *debtor is without interest* and this court without jurisdiction to alter it.

The same is true of the purchaser who has appealed.

Bourgeois vs. Jacobs, *p.* 1310.

In the exercise of the supervisory jurisdiction of the Supreme Court over inferior tribunals, we will not, when a judge has voted correctly, although the proceedings were irregular, but no injury done to the party, remand the case for him to make precisely the same ruling in the regular course of procedure.

State ex rel. Lamouraine vs. Judge, *p.* 1316.

The right to bond property sequestered is not suspended by a suspensive appeal from a judgment in which that right is not involved. *State ex rel. Stuart vs. Judge et al.*, *p.* 1322.

When a husband appeals from a judgment rendered against him in favor of his wife for a separation from bed and board, and for $1600 for paraphernal funds belonging to her, converted to his own use, the wife is not entitled to have the appeal dismissed *quoad* the moneyed judgment as being below the constitutional jurisdiction of the Supreme Court.

A separation from bed and board carries with it a separation of property. A moneyed demand accompanying an action for such separation is an incident of the main action, and becomes inseparably connected with it as so brought.

DeLesdernier vs. DeLesdernier, *p.* 1464.

Where the issue between the parties to a suit is not the right of ownership, but the right of possession, and the value of the latter right is as to amount below the appellate jurisdiction of the Supreme Court, an appeal taken to that court will be dismissed *ex proprio motu*.

Genella Praying for Possession, *p.* 1377.

A party can not obtain a suspensive appeal from a judgment on a rule which carries into execution a judgment already rendered. The judgment can be arrested only by a suspensive appeal or by injunction.

State ex rel. Paper Co. vs. Judge, *p.* 1418.

APPEAL—*Continued.*

To stay the execution of an order of seizure and sale by a suspensive appeal, an appeal bond must be furnished, within the delays allowed by law, in a sum exceeding by one-half the sum for which the order of seizure and sale issued. An appeal bond in such a case is governed by Art. 575, C. P.

Where in such a case, an appeal bond has been furnished which is insufficient in amount under Art. 575, C. P., to sustain a suspensive appeal, and where the appellee moved in the lower court for the dismissal of said appeal on the ground of such insufficiency, and the judge of the lower court refuses to pass on the question under the erroneous belief that the matter is not before him, relief will be granted to the appellee on an application to this court for writs of certiorari and mandamus.

State ex rel. Feibleman vs. Judge, *p.* 1426.

In case an exception of no cause of action is sustained in the District Court, the suit dismissed and an appeal is prosecuted to the Circuit Court of Appeals, the latter is without authority or jurisdiction to dispose of the case finally upon its merits on the theory that such an exception admits the truth of plaintiff's allegations for all the purposes of the case.

Such question does not involve the regularity and correctness of the judgment of said court, but their right to render *any* judgment in that attitude of the case.

State ex rel. Negrotto vs. Judges, *p.* 1437.

No appeal lies from an interlocutory order carrying into effect a final judgment. Said judgment can only be arrested on appeal or by information.

We have no control over a final judgment, and will not entertain an appeal from an interlocutory decree ordering its execution and review the judgment.

The Supreme Court has no appellate jurisdiction over a final judgment fixing the right of parties on property and ordering a partition. It can only notice the mode of partition when brought to its attention in proper proceedings.

Murphy vs. Murphy et al., *p.* 1482.

APPEAL—*Continued.*

Where in a case of alleged nuisance caused by a business apparently lawful, the judge, *ex parte* and *in limine*, improvidently issues an order for an immediate closing up of said business, and the facts alleged and the law do not warrant such an order, and the judge, on a rule to show cause, subsequently modifies the order of injunction so that the business may be conducted according to the laws of the State and municipal ordinances, and not otherwise, and so as not to cause a nuisance to the complain nts, and forbidding the person complained of from permitting the assembling of disorderly persons at his place of business; and where the facts alleged in the petition for injunction do not show that irreparable injury will result to the complainants from the modified order, the lower judge will not be compelled by mandamus to grant a suspensive appeal from the modified order and the alleged nuisance may be controlled and regulated *pendente lite*, under the modified order.

Koehl et al. vs. Judge, *p.* 1488.

ASSESSMENT.

It appearing that in previous years the property had not been assessed to *any one*, and not being able to obtain from the conveyance records of the parish wherein the same is situated, or by inquiry of the adjacent property owners, who is the proprietor thereof, it is permissible for the assessor to list it as that of an unknown owner. Such an assessment is not absolutely void and is a sufficient basis for a tax title that will support the prescription of three years under the act of 1874.

Want of thirty clear days' advertisement is an informality that is prescribed by five years. *Robinson vs. Williams*, *p.* 485.

ASSIGNMENT.

When a policy of insurance expressly stipulates that no assignment shall be valid without the consent of the company, an assignment without such consent is without effect.

Moise, Tutor, vs. Life Association, *p.* 736.

ATTACHMENT.

Where an attack is made upon certain proceedings in attachment and the judgment therein rendered, upon the ground of combination, collusion and fraud between the attaching creditor,

ATTACHMENT—*Continued.*

the debtor and the debtor's attorney, in order to give the attaching creditor an illegal preference, and the evidence shows that the latter's rights and priority are not dependent upon the acts complained of, but should stand and be valid independently of them, the attack must fall.

Rawlins vs. Sheriff et al., p. 58.

The attaching creditor of one who appears on the books of a corporation as registered owner of shares of its stock can not hold the stock against the true equitable owner who holds the certificate of stock duly indorsed by the debtor.

No estoppel arises to prevent the true owner from asserting his title. His permitting the debtor to appear as holder on the books of the corporation did not invest the latter with such *indicia* of title as could prejudice third persons, because he could not sell or dispose of the stock without producing the certificate.

As a general rule, attachment gives the creditor no better right to the property attached than the debtor had at the time of the levy; it takes effect only on the debtor's interest and does not amplify his title.

Whether the equitable owner, being a corporation, had the right to own stock in another corporation is dependent on its charter, which is not produced, or upon the circumstances under which the ownership was acquired, which are not in evidence; and, at all events, the attaching creditor has no right or interest to raise such question.

The alleged violation of its charter by the bank in electing the debtor as a director when he did not own, in his own right, twenty-five shares of stock, has no pertinence in this case, because the garnishee is not shown to have been privy thereto, and if it had been, that would not forfeit its ownership of the stock in favor of third persons not connected with either corporation.

Kern vs. Day, p. 71.

The possessor of real estate under an *unrecorded lease* is thereunder invested with no right whatsoever as against a seizing attachment creditor.

Flower & King vs. Pearce & Son, p. 853.

ATTACHMENT—*Continued.*

The condition on which the property attached is released and delivered to the defendant is that he should appear by attorney or in person, and that he should furnish security *judicatum solvi.*

The absent defendant, by appearing and bonding the property attached, waives citation.

The defendants in another suit judicially admitted their indebtedness to the plaintiff, and obtained judgment for the amount against plaintiff's former debtor.

They are not to be heard who allege things contrary to each other.

Williams et al. vs. Gilkeson-Sloss Co., p. 1018.

An attachment by an individual creditor for his own benefit will not be maintained pending a cession.

After the property of an insolvent has been sold it can not be seized by an individual creditor by attachment, who alleges that the insolvent has been convicted of fraud, and that his property is situated as though no surrender had ever been made.

The conviction of the insolvent debtor of fraud does not have the effect of annulling the cession accepted by the creditors. The effect of the conviction operates only on the debtor, depriving him of the benefits of the insolvent laws and subjecting him to the penalty of imprisonment.

Gumbel & Co. vs. Andrus et al., p. 1081.

ATTORNEYS AT LAW.

The knowledge of the attorney applied in the suit; his responsibility and labor are *criteria* of value in fixing his fee.

A fee for services rendered, under the eye of the court, will not be reduced unless manifestly excessive.

Interdiction of Leech, p. 194.

A question of fact only is presented in this case.

From the testimony in the record the fee of the attorney for absent heirs is fixed at $700. *Succession of Auld*, p. 248.

CERTIORARI AND PROHIBITION.

The proceedings in the lower court being regular, legal and within the jurisdiction of the judge thereof, the writs applied for are refused. *State ex rel. Scallen vs. Judge*, p. 241.

CERTIORARI AND PROHIBITION—*Continued.*

It is no longer an open question that *certiorari* can only be resorted to when proceedings are absolutely null.

It can not be made use of as a substitute for a motion to dismiss an appeal antecedent to the return day thereof.

State ex rel. City vs. Judge, p. 950.

CITATION.

Where a party appears and excepts to want of citation in a cause, which is overruled, and he then, reserving his rights under the exception, files a plea to the jurisdiction, the latter plea is not such an appearance as to cure the want of citation.

The political corporation known as a parish may be sued within its territorial limits in any court of competent jurisdiction.

Under the provisions of Art. 1077, Code of Practice, any constable of the parish can serve the citation issued by a justice of the peace. If the constable is an interested party the citation must be served by another constable or the sheriff.

State ex rel. Police Jury vs. Justice, p. 117.

The question is not one of constructive service *vel non*, but whether the wife, who is out of the State, can be brought into court to respond in a civil suit by citation on her husband, an absentee who happens to be temporarily in this State.

The service, in so far as she is concerned, being personal, the court was without jurisdiction.

Crow et al. vs. Sheriff et al., p. 1221.

The judge having directed the sheriff to retain the proceeds of sale subject to the further order of court, and he having acknowledged service and waived citation, the purchaser agreeing to become the stakeholder in his stead and consenting to pay such judgment as may be rendered against him for the proceeds, becomes thereby a party to the suit, and such an agreement is tantamount to a confession of judgment, and no further citation is required.

Bourgeois vs. Jacobs, p. 1310.

COLLATION.

The administration of the estate of the husband involves that of the community.

INSERTED BY OCR ERROR.

COLLATION—*Continued.*

The heir who is the donee of property of the community donated by her father may collate it in kind during the life of her mother.

The latter consented to the collation, and claimed her interest in the property collated.

The title tendered is legal. *Berthelot vs. Fitch et al., p.* 389.

COMMUNITY ACQUETS AND GAINS.

See Marriage.

CONSTITUTIONAL.

Act 111 of the Legislature of 1890, regulating accommodations of the races on railways, does not violate the thirteenth amendment of the United States Constitution, because such accommodations involve no badge of slavery or involuntary servitude, which is the sole subject of that amendment. Civil Rights Cases, 109 U. S. 3.

A long list of decisions, State and Federal, maintain that statutes or regulations enforcing the separation of the white and colored races in public conveyances and in public schools, so long at least as the facilities or accommodations provided are substantially equal, do not abridge any privilege or immunity of citizens, or otherwise contravene the fourteenth amendment of the United States Constitution.

In such matters, equality, and not identity or community, of accommodations is the extreme test of conformity to the requirements of the amendment.

The regulation of domestic commerce is as exclusively a State function as the regulation of interstate commerce is a federal function. This statute is an exercise of the police power and expresses the legislative conviction that the separation of the races in railway conveyances, with proper sanctions for substantial equality of accommodation, is in the interest of the public order, peace and comfort. It is a matter of legislative power and discretion with which courts can not interfere.

A proper construction of the statute does not (as contended by relator) authorize a conductor to assign a passenger to a coach to which his race does not belong, nor does it bind the passenger to accept such wrongful assignment, nor exempt the officers or companies from actions for damages in case of such wrongful

CONSTITUTIONAL—*Continued.*

assignment and refusal to carry when disobeyed. The discretion vested in the conductor to decide primarily the coach to which each passenger belongs is only that necessary discretion attending every imposition of any duty to determine whether the circumstances, under which the duty arises, exist. He exercises such discretion at his peril and at that of his employer.

Ex parte Plessy, p. 80.

The Legislature of a State, unlike Congress, which can not do anything which the Federal Constitution does not authorize, may do everything which the State Constitution does not prohibit, and constitutional prohibitions are not enlarged by construction beyond their terms.

Art. 113 of the Constitution of 1868 probibiting the adoption of children by special legislative act does not prohibit legitimation by such an act; the two subjects are separate and distinct.

No one can be said to have any vested right in any existing legal capacity in reference to any future contract or advantage to result from that capacity. He who to-day is by law a forced heir in expectancy may to-morrow by a new law be declared liable to be disinherited by will or incapable even of succeding *ab intestato*. It may be assumed as a general rule that the mere capacity or incapacity of particular classes of persons to contract or to inherit depends upon the legislative will.

Hughes vs. Murdock et al., p. 935.

CONTEMPT OF COURT.

The Civil District Court for the parish of Orleans is a court of record of original general jurisdiction, and is not an "inferior court," in the technical sense of that term. It has the power and authority to punish for contempt of court, and though the proceedings in cases of constructive, differ from those in cases of actual contempt, the power of that court, under proper proceedings, extends to both.

The general rule is that where a publication in a newspaper being read by jurors and attendants on the courts would have a tendency to interfere with the proper and unbiased administration of the laws in pending cases, it may be adjudged a contempt and accordingly punished.

CONTEMPT OF COURT—*Continued.*

Where an article of that character has been published, the resulting liability or responsibility is not limited to a civil action for damages by the individuals who might be injured thereby. Irreparable injury not to be compensated in money would make such a limited remedy totally inadequate to meet the requirements of the situation and would ignore a consideration of the question as affecting public morals and public interests.

Where the Civil District Court has pending before it a matter within its jurisdiction and it is charged that a certain publication is of such a character as to render the publication a contempt of court, the article complained of is, on trial of the charge, presented to it as a piece of evidence in support of the charge, in connection with other testimony, and on the evidence, as a whole, the court acts. The subject matter being within the jurisdiction of the court, some publications being liable to be adjudged an abuse of the liberty of the press and some not, and the conclusions to be reached being dependent upon the evidence submitted, the Supreme Court will not go behind those conclusions and inquire into their correctness on that evidence, under writs of prohibition and certiorari.

State ex rel. Phelps et al. vs. Judge, *p.* 1250.

CONTRACTS.

If he who proposes should, before consent is given by the promisee, change his intention, the concurrence of the two wills is wanting and there is no contract.

A mere proposal to sell may be revoked at any time before acceptance.

A condition dependent upon the will of the party to whom an offer to sell immovable property is made should be reduced to writing to secure its binding effect.

Miller vs. Douville & Gallagher, *p.* 214.

The adjudicatee of a contract for the collection of delinquent taxes and licenses of the city of New Orleans, for a specified year, is required to obtain and have prepared by the city notary a notarial contract therefor, conformably to the specifications of an ordinance adopted by the City Council in pursuance of a State law. *Held*, that failing to obtain such a contract for presentation to the Mayor for his signature he is without legal right to compel him, by *mandamus*, to sign any other.

CONTRACTS—*Continued.*

The writ of *mandamus* never creates any new authority, nor does it confer a power which did not exist before. It does not make duties, but lies to compel a party to do what was his duty without the writ. This writ will not lie unless the act desired is of absolute obligation on the part of the person to be coerced. The relator must show not only a clear legal right to have the thing done, but also by the person sought to be coerced, in the manner sought, and that he still has it in his power to perform the duty required. The action must not only be in respondent's power to do, but it must be his duty to do it.

State ex rel. Comerford vs. Mayor, p. 269.

A resolution adopted by the council of a municipal corporation authorizing and directing its mayor to enter into a contract with a third person, when not acted on by the mayor and when no contract is made, does not of itself create a contract.

City of Baltimore vs. City of New Orleans, p. 526.

Where an ice dealer agrees with another to furnish him ice at certain prices until a pool is formed to advance prices, in which the latter is also to be a member, and the pool is formed, the contract is ended.

In the formation of the pool if acts are done, and resolutions offered, with which the party to whom the ice was to be sold does not agree and refuses to become a member, he can not hold the other party to the contract and make him responsible for the acts of the members of the pool.

In case the facts of the case are disputed, and leave the existence of the contract in doubt, we will not disturb, without urgent reasons, the judgment appealed from, as the district judge was in a favorable position, from seeing and hearing the witnesses testify, to ascertain the truth.

Consumers Ice Co. vs. Trautman & Co., p. 775.

The facts of the case are fully discussed and the finding of the district judge approved.

The defence that plaintiff acquired the lottery ticket involved under a contract of sale reprobated by the law of Massachusetts was not alleged in the pleadings and is not sustained by any proof of

CONTRACTS—*Continued.*

Massachusetts law; and, moreover, even if originating in a reprobated transaction, the transaction is complet peand the results fully accomplished, and the defendant is such a *particeps criminis* as can not avail himself of such a defence under the doctrine of Brooks vs. Martin, 2 Wall. 80, and Antoine vs. Smith, 40 An. 567.

Hurley vs. Express Co. et als., *p.* 889.

Evidence to prove custom was properly admitted.

Custom or usage may be proved, not only to explain the meaning of terms to which is affixed a peculiar and technical meaning, but also to supply evidence of the intention of the parties regarding matters of which the contract itself affords indication, or it may be no indication at all.

The defendant bound itself to pay tolls on all timber towed to its mill through plaintiff's canal; the measurement to be ascertained by reference to "Doyle's Rule Tables," as published in Scribner's "Lumber and Log Book," at charge of twenty cents per thousand, of inch board measure.

The contract does not indicate the method to be followed in measuring a log; whether by its "average diameter" or by taking the diameter of the small end.

Board measure is the number of feet a log will yield when sawed.

When sellers of logs and those who have a right to collect toll on them do not choose to express their intention, in the contract, as to the mode of establishing the board measure, custom and usage furnish an explanation of the unexpressed intention.

The contract contains no stipulation about deductions for hollow or peeky logs; custom was consulted to fix the amount due on board measure.

The receipt of payment of toll on logs without stipulating that toll shall be paid on the steamboat or tug by which they were towed precludes the right of collecting toll on the steamboat or tug.

Whatever an agent does within the scope of his authority is, in legal effect, the act of the principal, who is entitled to its advantages and is also subject to its liabilities.

Destrehan vs. Lumber Co., *p.* 920.

CONTRACTS—*Continued.*

A person employed, *eo nomine*, "as a sugar broker," but who stipulates and consents to receive an annual fixed salary in lieu of commissions, and agrees to effect sales of sugar and molasses that are to be consigned to his employer, and for no one else; and obliges himself to exert all his personal influence to promote the interest of his employer, and to write all letters concerning the sugar and molasses market for his employer, and to make out all account sales of sugars and molasses in the transactions made by him—is a clerk in the ordinary acceptation of the term.

The leading and essential distinction between the capacity of a clerk and that of a broker is, the former hires his services, skill or industry, exclusively to another, while the latter is engaged to make bargains and contracts between two or more persons in matters of trade, commerce or navigation.

Courts of justice must look at the substance and essence of contracts rather than their form.

All contracts for the hire of labor, skill or industry, without any distinction, whether they can be performed by any other as by the obligor, unless there is some special agreement to the contrary, are considered as personal on the part of the obligor, but heritable on the part of the obligee.

Such a person is properly classed as a laborer within the meaning of R. C. C. 2747, and if turned away by his employer without sufficient cause he is entitled to make claim for the whole of the salaries he would have been entitled to receive had the full term of his services arrived. *Tete vs. Lanaux, Executor, p.* 1343.

CONTRIBUTORY NEGLIGENCE.

A passenger on a railroad train, when it stops at the station where he is to get off, and where he attempts to do so and is on the steps of the car, and the train moves ahead when he is in this situation, he is compelled to adopt a perilous alternative, to run the risk of being thrown from the train when its speed is accelerated, or to leave the train with less speed. In trying to escape imminent danger brought about by defendant's negligence, he is not guilty of contributory negligence, and the defendant corporation is responsible for its negligence.

Odom vs. Railroad Co., p. 1201.

CORPORATIONS.

Whether the equitable owner, being a corporation, had the right to own stock in another corporation is dependent on its charter, which is not produced, or upon the circumstances under which the ownership was acquired, which are not in evidence; and, at all events, the attaching creditor has no right or interest to raise such question.

The alleged violation of its charter by the bank in electing the debtor as a director when he did not own, in his own right, twenty-five shares of stock, has no pertinence in this case, because the garnishee is not shown to have been privy thereto, and if it had been, that would not forfeit its ownership of the stock in favor of third persons not connected with either corporation.

Kern vs. Day, p. 71.

A stockholder has the legal right to inspect the books of the corporation of which he is a member.

The error of the secretary in refusing to permit him to inspect the books is not of itself ground for damages against the corporation.

The company was not placed in default, and the act is not fixed upon the company as an act for which it is responsible.

Legendre vs. Brewing Association, p. 659.

The stock of corporations can not be increased except by compliance with requirements of Act 26 of 1882, and until those requirements have been fulfilled the increased stock has no existence.

A sale by a corporation of such non-existent stock, and the delivery of a certificate therefor to an innocent third person who pays cash therefor, violates the vendor's warranty of the existence and validity of the thing sold, and entitles the vendee to recover the price.

Lincoln vs. Express Co., p. 729.

The authority of an officer to bind a corporation in the management of its ordinary business may be fairly implied.

There being no proof nor allegation of fraud or unfair dealing, the plaintiff, a third person, can not require an imputation of payment between creditor and debtor to be changed.

Bank vs. Plow Co., p. 1214.

CORPORATIONS—*Continued.*

Notwithstanding the affairs of the Consolidated Association of Planters of Louisiana are in process of liquidation in a Federal court, a court of this State is quite competent to entertain, and, on sufficient proof, make absolute a rule taken for the cancellation of a mortgage resting on property against which another special mortgagee is proceeding by seizure and sale on a competing mortgage.

Peuch et al. vs. Daret, p. 1281.

COURTS.

The recorders' courts are "examining courts," within the meaning of the statutes.

Judges of the District Courts have the power to act as magistrates, to cause offenders to be arrested, and bound over or discharged.

They do not do this as judges of the District Courts, nor as justices of the peace, but as magistrates authorized to perform these duties.

The recorders have similar powers, as committing magistrates, in bailable cases.

Under constitutional authority, the General Assembly "may provide for police or magistrates' courts."

Without restriction or limitation, the General Assembly has vested recorders with the authority of committing magistrates.

It is held in a number of decisions that recorders can exercise the functions of committing magistrates.

It should require very controlling considerations to induce any court to break down former decisions and lay again the foundation of the law.

State ex rel. District Attorney vs. Recorder, p. 309.

CRIMINAL LAW.

APPEAL.

A motion to dismiss an appeal because no appeal bond was given must be filed within three judicial days after the transcript is filed.

Our jurisdiction to examine and determine the legality and constitutionality of a city ordinance is controlled by the Constitution, and is restricted to questions of law in such case as this.

A particular is not repealed by a general law, unless the two are so repugnant that they can not stand together under any circumstances. *State vs. Callac*, p. 27.

CRIMINAL LAW—*Continued.*

If defendant fails to retain a bill of exceptions to the refusal of the trial judge to grant a motion for a new trial, the ruling is not examinable. *State vs McTier, p.* 440.

Objections can not be brought before this court through bills of exceptions taken for the first time on a motion for a new trial which should have been reserved during the progress of the trial itself. *State vs. West, p.* 928.

The statement of the judge copied in the bill of exceptions is not questioned; if it were it would not avail the defendant in his defence, for this court will not review the evidence in the record to determine whether the venue of the crime was proved.
State vs. Clifford, p. 980.

It is settled law in this State that rulings of the trial judge on questions not submitted to the jury, but to the judge alone, and involving blended issues of law and fact, are reviewable in this court, on the facts as well as on the law, provided the testimony has been reduced to writing and embodied in, or attached to, the bill of exceptions taking to the ruling.
State vs. Nash & Barnett, p. 1137.

The transcript of appeal in this case is so flagrantly defective that it can not be dealt with as a judicial record. The judgment and the verdict upon which it was based can not stand on such a record and must be set aside, and the defendants be detained in custody for further proceedings.
State vs. DePass et als., p. 1151.

A judge who refuses to grant an appeal in an appealable case, on the ground that the issues raised had been repeatedly determined by the Supreme Court adversely to the contention of the party moving for the appeal, and that the applicant was through his motion seeking to abuse the right of appeal, acts unjustifiably. He has nothing to do with the motives prompting the exercise of the legal right nor the final result of the controversy.

Though the rulings of a judge in a cause be erroneous he is protected in that cause from liability for resulting costs, from motives of public policy. *State ex rel Dufard vs. Recorder, p.* 1303.

CRIMINAL LAW—*Continued.*

Where a justice of the peace illegally imposes the penalty as a police magistrate, the remedy to correct his illegal act is by invoking the supervisory jurisdiction of this court, and not by appeal.

State vs. Carreau et als., *p.* 1446.

APPEARANCE BOND.

If during the pendency of an appeal from a judgment of forfeiture on an appearance bond the defendant is convicted and sentenced, the surety on the bond is entitled to be discharged.

State vs. Schexneider, *p.* 1445.

ARGUMENT.

Counsel assisting the district attorney has the right to open and close the argument.

The State attorney should not say to the jury in his argument that he believed the accused to be guilty; but if the latter does not ask the judge to stop the argument, or to charge the jury to disregard the statement, he can not complain.

State vs. Mack, *p.* 1155.

ARRAIGNMENT.

In the absence of an arraignment of an accused there can be no valid conviction.

State vs. Fontenette, *p.* 902.

The accused pleaded not guilty when he was arraigned.

Subsequently he substituted the plea of guilty of a minor offence to that charged.

The plea was accepted by the State, and the case called at the time for trial was, in consequence, not submitted to a jury.

More than ten months had elapsed from the date of his arraignment to that on which he applied to substitute the plea of not guilty to the plea of guilty.

The motion to withdraw the plea was not timely made, during the session, and granting the motion would have operated a continuance.

The court states that the accused was represented by able and experienced counsel during the trial, and that the plea of guilty was not unadvisedly entered.

CRIMINAL LAW—*Continued.*

The court in proper cases will freely exercise its discretion by allowing the plea of guilty to be withdrawn, and not guilty pleaded in its place, but such a discretion will rarely, if ever, be exercised in aid of an attempt to rely upon a mere dilatory or formal defence. *State vs. Williams*, p. 1356.

AUTREFOIS ACQUIT.

The plea of *autrefois acquit* involves questions of mixed law and fact, and, when not demurrable on its face, is properly referred to a jury.

The test whether the plea of *autrefois acquit* is a sufficient bar is whether the evidence necessary to support the second indictment would have sustained a legal conviction on the first.

Under the application of this test it has been constantly held that acquittal under an indictment for larceny of goods alleged to belong to A is no bar to subsequent indictment for larceny of the same goods alleged to be the property of B, where it is shown that the first acquittal was due to the misnomer in the allegation of ownership. The second jeopardy was not for the "same offence," and the evidence essential to sustain the second charge would necessarily have been fatal to the first. The authorities to this effect are so numerous and concordant that we feel bound to follow them. *State vs. Williams*, p. 986.

Where a party has been prosecuted by the municipal authority of the city for fighting and disturbing the peace; this is no bar to a prosecution for the same offence by the State.

State vs. Clifford, p. 980.

CHANGE OF VENUE.

After the discovery of the prejudice alleged to exist against a defendant, it is his duty to apply as soon as practicable for a change of venue, either in chambers or open court. If several months elapse after the discovery is made it is too late to apply for a change of venue in open court, when the defendant had the opportunity of applying to the judge in chambers. In reorganizing the judicial districts throughout the State, there was no necessity for an enabling act, conferring jurisdiction on the district courts, which were in existence in pursuance of constitutional provisions. *State vs. Chambers et al.*, p. 36.

CRIMINAL LAW—*Continued.*

Ordinarily, in criminal cases, our supervisory jurisdiction is only exercised when there is no remedy by appeal; but inasmuch as it can not be determined till after the trial and sentence whether this cause will be appealable or not, and as the question relates to a change of venue involving the necessity of forcing relators to meet a trial in a parish different from their domicile and subjecting the State to the expense and trouble of a vain trial, the jurisdiction is properly invoked.

The Act 95 of 1876 repealed the former law authorizing the prosecuting attorneys and district judges to order a change of venue whenever in their own judgment it was necessary in order to secure a fair trial, and requires that change of venue shall be ordered only after its necessity has been "established by legal and sufficient evidence," which contemplates a contradictory trial of the issue and the hearing of evidence adduced by both parties.

An order granted on the simple motion and affidavit of the district attorney without evidence adduced in support of it, and without opportunity afforded to defendants to adduce evidence, is irregular, null and void, and will be set aside in the exercise of the supervisory jurisdiction.

Broullette vs. Judge, p. 243.

Although applications for certiorari to supply deficiencies of record ordinarily come too late after submission, yet under the particular facts of this case, and considering the defendant's assignment of error availing of these defects was itself filed only after submission, the application is allowed, on the ground that defendant's laches excuses the laches of the State.

Applications for change of venue on the ground of local prejudice are addressed to the sound discretion of the trial judge, and if he has not manifestly abused that discretion this court will not interfere with his ruling. When the evidence taken is contradictory and inconclusive, and when the judge bases his ruling not only on the evidence, but on his own knowledge of the facts and circumstances, it would require a very extreme case to authorize our interference.

State vs. Forman, p. 1047.

CRIMINAL LAW—*Continued.*

CONTINUANCE.

Refusal of continuance on ground of absent witness will not be interfered with when the judge's statement on the bill shows want of due diligence.

State vs. Lewis, p. 24.

The provisions of Act 139 of 1890 require that an accused, when on final trial, shall not be allowed more than six witnesses for his defence to be summoned, unless he or his counsel shall make oath that same is necessary; and, the record disclosing that six witnesses had been already summoned, he is disentitled to delay to summon additional witnesses, without such prerequisite condition has been observed.

A continuance may be properly refused, if application is based upon the necessity for the presence of such witnesses on the state of facts herein recited.

State vs. Guillory, p. 31.

This court has repeatedly held that it will not interfere in the matter of continuances with the discretion vested in the trial judge unless his rulings are manifestly unjust and arbitrary.

The same rule is applicable to his rulings on applications for attachment against witnesses.

Where twenty-four witnesses have been summoned to prove an alibi and two do not attend, and the judge refuses to grant a continuance because of their absence, the evidence being cumulative only, his rulings were the exercise of a sound legal discretion in the interest of public justice in a manner that could in no way injuriously affect the defendants.

State vs. Hillstock, p. 298.

There is no occasion for the postponement of the trial of a motion for a change of venue, to enable an accused to obtain the attendance of an absent witness, and cause his testimony to be reduced to writing for the purpose of having same annexed to a bill of exceptions, when the trial judge concedes the statement as made, and actually incorporates same into defendant's bill of exceptions. Had there been a difference of opinion as to the facts such witness could swear to if present, the accused would have had the right he claimed.

CRIMINAL LAW—*Continued.*

In case the accused desires a witness to be called and sworn on the trial of such a motion, and it appears that he is, at the time, on a jury having under consideration an important criminal case, the judge exercises proper discretion in refusing such application, the testimony being of like character as that of numerous other witnesses residing in the same ward of the parish who had been already sworn, and, therefore, only cumulative.

The allowance *vel non* of a continuance of a criminal cause is matter for the sound judicial discretion of the trial judge, upon the case made on the defendant's motion, and its exercise will not be disturbed except for cogent and manifest error.

State vs. Rodrigues et als., *p.* 1040.

COURTS.

Act 69 of 1890 made no change in the autonomy of the district courts in the several parishes. The courts in the several parishes remained the same though differently distributed as to districts. All proceedings, rules or orders of court continued in force until changed, and the existing orders as to terms of court remained in full force.

Act 22 of 1892 does not affect the terms of court as fixed by Act 7 of 1880. This act is merely a reproduction literally of Act 7 of 1880, which made no change in the law, except the special provision made for the parish of Camerou.

State vs. Chambers et al., *p.* 36.

CRIMES.

Mayhem implies a permanent injury or crippling,

Less than mayhem, denounced as a crime, under Act 17 of 1888, has as clear and definite a meaning as mayhem, indicating the acts which are made punishable. *State vs. Hagan*, *p.* 839.

EVIDENCE.

On the trial of this case, defendant, charged with perjury for having, in a cause wherein he was accused of wounding one Cora Hall, falsely sworn as a witness on his own behalf that she had on the 18th of March, 1892, at a certain house on Rampart street in New Orleans told Officer Cenance that he (the witness) had cut her accidentally and that she did not wish to have him

CRIMINAL LAW—*Continued.*

punished, asked one of the witnesses whom he had called in his defence whether Cora Hall had not at witness' house on the 29th of March, 1892, told her that accused had cut her accidentally. The State objected to this question, assigning as reasons that as defensive evidence proper, it was irrelevant to the particular issue involved in the case and that as impeaching testimony it was inadmissible, Cora Hall not having been a witness in the case and no foundation having been laid for such testimony. The judge sustained both objections. The ruling on both points was correct.

An accused can not claim as a right that he should be permitted to introduce witnesses to rebut testimony which the State had been permitted to offer (after both parties had closed their case) in rebuttal of one of defendant's witnesses. It is a matter resting greatly in the discretion of the trial judge.

Where the State had under such circumstances placed a particular witness for the first time on the stand, the accused has the right then to impeach him, but the trial judge is justified in refusing to allow the witness to be asked questions as to irrelevant collateral matters not bearing upon the issue in the case, in order from the answers thereto to lay a foundation for such impeachment. *State vs. Spencer*, *p.* 1.

The mere fact that a judge in sustaining objections to the introduction of testimony does so on grounds different from those urged is not assignable error, particularly where neither the judge's reasons nor those of the district attorney are questioned as to their correctness, nor given in the bill of exceptions.

It is the duty of an accused in offering testimony not apparently relevant to disclose to the court the particular facts he expects to elicit, with explanations sufficient to show the admissibility of the testimony; it does not suffice to say in general terms that he proposes through it to establish his innocence, and that some one other than himself had killed the deceased.

Where a third person some time after the commission of a homicide declares that he killed the deceased, such declaration would be rejected as hearsay if the party after making it had escaped. The character of the testimony is not changed by the accidental fact that he had died instead of escaping.

State vs. West, *p.* 14

CRIMINAL LAW—*Continued.*

It is not good ground for admitting *hearsay* testimony, as part of the *affirmative* evidence for the prosecution, that it is in supposed corroboration of the statement of another witness, which might be the subject of attach or impeachment.

State vs. Guillory, p. 31.

Statements of the accused when made to the trial judge freely and voluntarily are admissible in evidence.

Any fact or circumstance is admissible in evidence to identify the accused. It is no objection to it that it is remote. The objection goes to the effect of the evidence.

State vs. Chambers et als., p. 86.

The statement objected to as self-serving and hearsay was not open to the suspicion of being part of a determined plan of defence; it was admissible in evidence.

If the defendant in a criminal case jointly indicted and tried with another defendant charged with the same offence avails himself of the privilege given him by statute, of testifying in his own behalf, and he incriminates his co-defendant, he is to be regarded and treated as any other witness.

Therefore, his character for honesty may be put at issue by his co-defendant, whom he seeks to inculpate, in an examination as to the general character of the witness for truth and veracity.

The character of a witness in the neighborhood in which he lives is subject to inquiry. It is inadmissible to ask what character the witness had in a neighborhood in which he resided at a period long prior to the trial.

With one exception there is no error in the ruling.

The judgment is annulled and the case remanded for trial.

State vs. Taylor et al., p. 605.

There are exceptions to the rule that no evidence is admissible of distinct offences committed by the defendant than that charged in the indictment, when it is material to show the intent with which the act charged was done. *State vs. Anderson et al.*, p. 651.

There are cases under an exception, settled in jurisprudence, in which evidence is admissible of another offence than that charged, to prove the intent of the defendant.

State vs. Porter, p. 661.

CRIMINAL LAW—*Continued.*

It is the duty of the court to pass upon all questions as to the admissibility of evidence—that of the jury to judge of its sufficiency.

It is not necessary for the purposes of a prosecution under Sec. 833, Revised Statutes, that the order for the payment of money or for the delivery of goods should be full and complete on its face. It is sufficient if it be shown to be such by the known and accustomed dealings between the parties.

The mere *names* of the crimes given in the heading of a series of sections in the Revised Statutes do not cause the statutory crimes found in the sections to fall and be governed by all the rules applicable to the crimes as technically named in the headings. *State vs. Stephen*, p. 702.

It is a settled rule of law, that when two or more persons are jointly indicted for the commission of one and the same offence, the confession of one, made in the absence of the others, implicating himself and others, may be properly admitted in evidence, but it is to be received as evidence against the party making it, and the jury should be so instructed.

Unless the whole of a confession is received in evidence and considered, the true meaning and import of the part which is good evidence against him can not be ascertained.

It is admissible for the prosecution to contradict any part of the prisoner's statement that is given in evidence, and then the whole testimony is left to the jury for their consideration, precisely as in other cases where one part of the testimony is contradictory to another.

If the confession implicates other persons by name, yet it must be proved as it was made, not omitting names; but the judge's duty is to instruct the jury that is not evidence against any but the person who made it.

Res gestæ consist of circumstances or declarations made admissible as original evidence by reason of their connection with the particular fact under investigation; and the test is whether the fact or circumstance put in evidence is so connected with the main facts under consideration as to elicit its character, to further its object, or to form, in conjunction with it, one continuous transaction.

CRIMINAL LAW—*Continued.*

The general rule in reference to the introduction of evidence for the purpose of rebutting other evidence in respect to character seems to be that it must be confined to general reputation, and not permitted to descend to proof of particulars and specific facts.

It is not competent to contradict a witness as to *collateral* facts; and the test as to whether or not it be a matter as to which he could be contradicted, is whether or not the same evidence could be heard in support of their defence.

State vs. Donelon et al., p. 744.

The overt act or hostile demonstration of the deceased against the accused must be proved before the introduction in evidence of communicated threats.

The trial judge is clothed with discretion to determine whether a hostile demonstration had been made by deceased against accused.

The tendency of recent adjudications is to extend, rather than to narrow, the scope of the introduction of evidence as part of the *res gestæ*. As a general rule, when it is necessary to inquire into the general nature of the act committed, or the intention of the party who did the act, proof of what the person said at the time of doing it is admissible evidence as part of the *res gestæ*, for the purpose of showing its true character. The general rule is that the declaration sought to be proved must be contemporaneous with the event sought to be proved as the principal fact; but when there are connecting circumstances they may, even when made some time afterward, form a part of the whole *res gestæ*.

An act can not be varied, qualified, or explained by a declaration which amounts to no more than a mere narrative of a past transaction, nor by an isolated conversation, nor by an isolated act done at a later period.

On a difficulty which resulted in a homicide and in the conflict the ear of the deceased was bitten or torn off by the accused, it is admissible evidence to prove the finding of the severed ear on the ground where the conflict took place fifteen or twenty minutes thereafter, and the acts and declarations of the accused in relation thereto, when the severed ear was pointed out to him on the ground, are also admissible. *State vs. Harris, p.* 842.

CRIMINAL LAW—*Continued.*

Evidence that a person other than defendant confessed that he himself committed the crime is inadmissible, it being hearsay and irrelevant. State vs. West, 45 An. (La.); Gray's Case, Ir. Cir, Rep. 76; Welsh vs. State (Ala.), 11 South 451; 30 Pac. 7.

State vs. West, p. 930.

There are two modes guarding against the abuse of a witness on cross-examination who testifies in his own behalf as a defendant.

1. The privilege to decline to answer any question which may tend to charge him as a criminal.
2. The power of the court to protect the defendant from unreasonable or oppressive cross-examination.

It is not shown that one or the other was denied.

Where upon the trial the defendant offers himself as a witness and testifies in his own behalf, under statute of 1886, he thereby becomes subject to the same rules and is called upon to submit to the same tests which are legally applied to other witnesses.

The question propounded to the defendant on his cross-examination was competent for the purpose of proving that he had been arrested for stealing prior to the date of the theft for which he was on trial. *State vs. Murphy, p.* 958.

When two parties have had a difficulty, if one of them quits the combat and retreats in good faith, and is pursued by the other, who continues to follow him up with violence and hostility, and should it become absolutely necessary for the one retreating to turn and fell his pursuer in order to save his own life, he is justifiable, whether he was the aggressor in the beginning of the difficulty or not. State vs. Tucker, 38 An. 536 and 789; Archbold's Criminal P. and P., Vol. 1, p. 690; Am. and Eng. Ency. of Law, Vol. 9, p. 602.

A person free from fault when attacked by another, who manifestly attempts by violence to take his life, or to do him great bodily harm, and under such circumstances that no retreat is practicable, is not only not obliged to retreat, but may pursue his adversary until he has secured himself from all danger; and if he kill him in so doing, it is justifiable self-defence. 1 East P. C. 271, 272; Luby vs. Com., 12 Bush (Ky.) 1; Pond vs. People, 4 Cooley (Mich.) 177; 2 Starkie on Evidence, 963; Foster, C. L. 278.

CRIMINAL LAW—*Continued.*

In criminal trials it is the exclusive province of the jury to weigh and give effect to the evidence.

State vs. Thompson, p. 969.

The State should not be permitted in a criminal case to cross-examine a witness for the defence on matters not growing out of facts and circumstances stated in his direct examination.

The legality of the cross-examination must be tested by the matters stated by the witness in his examination in chief, and not by the consideration of the purpose for which he had been introduced.

The court is not justified in permitting one of defendant's witnesses to be cross-examined as to matters not testified to by him on direct examination, for the reason that the same facts had been testified to by several witnesses both for the State and the defence, and the testimony was only cumulative. Cumulative evidence on the trial of the cause must not be confounded with cumulative evidence claimed to have been newly discovered and sought to be made available after verdict as a ground for a new trial.

Evidence of the statement of a third person that he alone was guilty of the crime charged was properly excluded. It was clearly hearsay. *State vs. Taylor et al.*, p. 1303.

In a prosecution for murder, the defendant will not be allowed to show the dangerous character of the deceased or threats by him unless a hostile demonstration by the deceased has first been proven.

State vs. Carter, p. 1326.

In case an accused person avails himself of the grace of the special statute authorizing him to testify in his own behalf, he occupies the dual position of witness and accused, and his credibility may be attacked by interrogating him in reference to his having been previously prosecuted or criminally punished, and his character indirectly involved.

State vs. Alexis, p. 973.

There having been no note of the evidence taken at the trial, except that which counsel has summarized and incorporated in a bill of exceptions, we feel bound, under repeated decisions, to accept the judge's statement in case of any variance between them.

CRIMINAL LAW—*Continued.*

And the statement of the judge being that the confession of the accused was free and voluntary, it was admissible in evidence.
State vs. Nash, p. 974.

It does not necessarily follow that a homicide was not murder because done in sudden passion. There are many cases where that fact would entitle an accused neither to an acquittal nor to a verdict of manslaughter. *State vs. Ashley*, p. 1036.

An offer of compromise of a crime, unaccepted by the prosecutor, may be proven by the State as an admission of guilt, or as disclosing possession of the property which is the subject of the burglary and larceny charged in the indictment.
State vs. Rodrigues, p. 1040.

Defendant in a criminal case is not entitled, as a matter of legal right, to offer testimony in rebuttal of testimony in rebuttal.

The fact that after the defendant had closed his case the State recalled ome of its own witnesses and interrogated them as to matters which might have been relevantly and properly introduced originally as part of the State's evidence in chief, does not necessarily affix to that testimony the character of new and direct "cumulative" evidence in chief. In the case at bar the testimony was strictly in the line of rebuttal, and not going beyond rebuttal must fall as to its contradiction, under the rules governing testimony. The purpose of the testimony was to disprove, not to prove, and was not offered at that late stage of the proceedings to introduce against the accused an admission or confession to establish his guilt. If accused feared that the jury would give to the rebutting evidence, legally introduced, an effect beyond its legitimate scope, his remedy lay in asking from the court special instructions on that subject and not in departing from the rules governing the practice in relation to that kind of testimony. *State vs. Boswell*, p. 1158.

The fact whether or not an overt act of hostility of deceased against defendant has been proved, preparatory to the introduction of evidence as to communicated threats or the dangerous character of deceased, is within the discretion of the trial judge.
State vs. Stewart, p. 1164.

CRIMINAL LAW—*Continued.*

It is shown that the confession admitted in evidence was free and voluntary, and it was therefore admissible.

Between the ages of seven and fourteen years an infant is deemed *prima facie* to be *doli incapax*, but the maxim *malitia supplet ætatem* may apply. The legal presumption of incapacity may be rebutted by evidence of mischievous discretion.

Expert testimony is admissible to prove capacity for committing crime. *State vs. Nickleson*, *p.* 1172.

A witness having stated that "she does not know what would be the consequence, nor how she would be punished, if she testified falsely," and the judge having certified that "from the manner of the witness on the stand and her answers to questions, she exhibited as much intelligence as ordinary persons of her class," *Held:* That the witness is "a person of proper understanding" under Act 29 of 1886, and that her statement does not show that she is ignorant of the nature of an oath.

A person to whom complaint has been made by the victim of a rape, or of an attempt to ravish, can not be permitted to repeat at the trial all the details of the outrage as reported to the witness; but can only testify to the fact of the complaint having been made and to the condition of the victim when making the complaint. As part of the *res gestæ* such statements are admissible and defendant may bring them out on cross-examination. They may also be given to corroborate the testimony of the prosecutrix, but only when her testimony has first been impeached.

State vs. Langford, *p.* 1177.

On cross-examination of an accused, upon matters not legitimately to be asked in rebuttal, but which it is claimed might properly be asked by way of impeachment or attack upon the credibility of the witness, prosecuting attorneys should announce the object and purpose of their questions, and offer to restrict the effect of the testimony. *State vs. Kennon*, *p.* 1192.

GRAND JURY.

The grand jury is drawn to serve until discharged by the court, and not for any particular week.

State vs. Bennett, Jr., *p.* 54.

CRIMINAL LAW—*Continued.*

HABEAS CORPUS.

An information presented, which the court orders to be filed, is not of itself ground for writs of *habeas corpus* and *certiorari*, for she can only have the benefit of *autrefois acquit* by special plea entered in the court in which the information is pending.

After the court will have ruled, the defendant will not be without remedy, if error be committed.

The accused can not interpose the plea of *autrefois acquit* in an application for writs of *habeas corpus* and *certiorari*.

The rule *nisi* is discharged and the application is denied.

State ex rel. Williams vs. Sheriff, p. 316.

Where subsequently to verdict and prior to sentence doubts arise as to the sanity of the person convicted the court has the right, upon the suggestion of the district attorney, to cause an investigation to be made on that subject.

Authority to that effect can be found in Sec. 1768 of the Revised Statutes, if direct authority for that purpose be necessary.

The judge is authorized to engraft upon the criminal proceedings in his court, not yet closed, the proceeding provided for in that section, and in the absence of a direct mode of procedure being exacted, to mould it to correspond with the analogous methods of proceeding resorted to for the purpose of the trial of special issues.

State ex rel. Chandler, etc., p. 696.

INDICTMENT AND INFORMATION.

The crime of perjury is sufficiently charged in an information by use of the words feloniously, falsely, corruptly, knowingly and maliciously. The special word "wilfully" is not sacramental.

It is not true that the averments of an information for perjury relatively to the testimony given by the accused in the original action should show affirmatively that that testimony was admissible and competent, and could not have been excluded on any legal ground, and that failing so to show and to set out all the facts necessary to have made it admissible, the information is fatally defective.

State vs. Spencer, p. 1.

CRIMINAL LAW—*Continued.*

Sec. 1047 of Revised Statutes applies only to amendments of indictments, which, being found by a grand jury, would not be amendable by the court in absence of special statutory authority.

Such statutes are not necessary to authorize amendments to informations, because the officer prosecuting them is always present in court and competent to make amendments with leave of the court to any extent consistent with public interest and private rights.

Crimes not capital can only be prosecuted by information, "with the consent of the court first obtained;" and amendments thereto are peculiarly within the discretion of the court, especially as to the denial thereof.

Appeals by the State from such rulings are vain and profitless, because the prosecuting officer may instantly frame a new information and secure greater expedition of trial without undergoing the delay of appeal. We shall not encourage such practice by interfering with the discretion of the court at the instance of the State. *State vs. Terrebonne et al., p.* 25.

When an indictment is returned into court charging a particular person with wilful and corrupt perjury under an oath administered to him by the clerk of the Supreme Court, declared as "having competent authority to administer said oath," and said indictment is beyond criticism as an instrument from the standpoint of the regularity of the proceedings connected with its finding—the legality of the body returning it and the sufficiency of the averments it makes—it can not be stopped on its way to the petit jury by the accused and subjected, on a motion to quash, and testimony taken thereunder, to an attack made by him and submitted for independent determination by the district judge as to the sufficiency of the evidence before the grand jury to reach the conclusions it did, or the correctness of the legal conclusions reached by that body from the evidence before it.

The conclusions of the grand jury on the evidence before it are not subject to review by the district judge; they must pass on to and be determined by the petit jury as compound questions of law and fact under instructions from the court.

State vs. Chandler, p. 49.

CRIMINAL LAW—*Continued.*

When an indictment is regularly indorsed and presented in open court and filed, it is not necessary that the minutes should set out the indorsements. The statement that on an indictment a trial bill was presented against the defendant for the crime and filed is sufficient.

State vs. Bennett, Jr., *p.* 54.

In case the entire charge of an information is set out in one continuous, unbroken sentence, two seemingly antagonistic parts thereof not being separated by semicolon can not be fairly construed as charging two separate and distinct offences, rendering it liable to the objection of duplicity. It is more consonant with reason and the spirit of our jurisprudence that the subordinate or charging portion of the information be treated and considered as explanatory of the character of the offence that is denounced.

State vs. McTier, *p.* 440.

The indictment prepared by the district attorney is the formal presentation of the finding of the grand jury, and the omission of his signature can be remedied at any time in accordance with Sec. 1064, Revised Statutes.

The omission of the signature of the district attorney being a formal defect only, it must be taken advantage of before trial by demurrer or motion to quash the indictment.

State vs. Crenshaw, *p.* 496.

The English statutes on the subject, followed generally by the statutes of the American States, do not denounce embezzlement as a distinct and independent crime *eo nomine*, but make it a statutory larceny, and it is, therefore, well held that an indictment or information under such statutes must allege the ownership of the thing embezzled and contain the other averments essential in larceny.

The Louisiana statute differs in this respect, and contains no language referring embezzlement to the class of larcenies, but denounces it as a substantive and independent crime *eo nomine*, and there is no reason for applying the foreign rule requiring the averments essential in larceny.

CRIMINAL LAW—*Continued.*

The statute describes the acts constituting the crime with such precision and certainty as fully to inform the defendant of the nature of the charge, and an information following the words of the statute is sufficient.

State vs. Fricker, p. 646.

An indictment which correctly contains the defendant's name, but on the endorsement there is a variance, the endorsement may be corrected at any time to conform to the description in the body of the indictment.

No advantage can be taken of a defective endorsement corrected and amended with the consent of the defendant in open court, aided and assisted by his counsel.

State vs. Anderson et al., p. 651.

Under the laws of Louisiana, all parties present aiding and abetting at the commission of a felony are principals therein.

An indictment, in a separate count which charges that certain persons were present aiding and abetting another in the commission of a felony, charges them as principals therein.

State vs. Littell et als., p. 655.

The title of an act has legislative force only to a limited extent.

Where the word "wilful" is to be found only in the title of a statute an indictment under the latter which follows the exact words of the enacting clause, but using the word "feloniously" in lieu of the word "wilfully," complies with the law.

The former term has a more extensive criminal meaning than the latter and includes it.

State vs. McDaniel, p. 686.

An indictment charging some but not all the elements of burglary, but containing a perfect charge of larceny, though bad as to the burglary, is good as to the larceny, and a verdict of guilty of larceny will be sustained.

The insufficient averments of burglary may, either on trial or on motion in arrest, be treated as superfluous and disregarded. Whart. Cr. Ev. Sec. 138; 35 An. 1059.

State vs. Richardson, p. 682.

CRIMINAL LAW—*Continued.*

Where the instrument which is charged to have been falsely altered is in its character for money or for the delivery of goods *at the option of the holder* it must in order to conform to the fact of necessity be so described in the indictment.

Sec. 833 of the Revised Statutes does not make it necessary in an indictment under it to charge that an accused "sought to obtain money" upon the altered instrument.

When an indictment in its recitals complies with the legal requirements of the statute under which it is drawn an additional statement of facts to supplement the recitals need not be set forth with technical precision.

State vs. Stephen, p. 702.

It is not sufficient ground to quash an indictment that the indicted persons appeared before the grand jury and were interrogated as witnesses, they having been at the time incarcerated in jail, under capiases from the recorder's court, the proof disclosing that, at the time each was examined, he was informed that he had the right to decline to make answers to such questions as might tend to incriminate himself, or render him liable to a criminal prosecution.

State vs. Donelon et al., p. 739.

Our law is liberal in allowing amendments of misnomers in indictments, and it would be better practice for the State to avail itself of such privilege, but as it is not required as a duty, the failure to amend does not forfeit any legal right of the State.

State vs. Williams, p. 936.

Act 35 of 1880 authorizes the district attorney to file information in the office of the clerk of the District Court, when not in session, in all cases where the penalty is not imprisonment at hard labor or death. His duty in filing such information is not limited to those held in custody by the sheriff.

State vs. Jackson, p. 975.

Parties visiting the grand jury on business before them, when nothing is said or done in relation to defendant's case, can not prejudice the defendant, and he has no cause of complaint.

CRIMINAL LAW—*Continued.*

A person having knowledge of the commission of a crime has the right, without being summoned, to go before the grand jury and disclose his knowledge of the commission of said crime.
State vs. Stewart, p. 1164.

An indictment for arson may charge the offence as wilfully done or maliciously done, or each of the qualifying words may be used alone. *State vs. Nickleson*, p. 1172.

Where an information for assault with intent to ravish charges that the defendant "with force and arms, unlawfully did make an assault upon A B, with intent her the said A B then violently and against her will feloniously to ravish and carnally know," the information is sufficient. *State vs. Langford*, p. 1177.

Under Sec. 792 R. S., which announces the offences of assaulting another by *wilfully* shooting at him, an indictment is fatally defective which charges that "A B did wilfully make an assault upon C D by shooting at him." The characterization of the assault is essential, and the indictment should follow the statute.
State vs. Langston, p. 1182.

Section 790 R. S., as amended by Act 24 of 1882; Section 791 R. S., as amended by Act 43 of 1890, and Act 44 of 1890, are harmonious parts of one subject of criminal punishment.

The offences denounced by Act 44 of 1890 are contained in Act 43 of 1890, and the offences denounced by the latter are contained in Sec. 790 R. S.

An information properly drawn under Sec. 790 R. S. contains accusations under all three of said statutes, to-wit: Sec. 790 R. S., Sec. 791 R. S., and Act 44 of 1890.

A verdict under Sec. 793 R. S. is not responsive to an accusation under any one of said three statutes. *State vs Price*, p. 1430.

One of the general rules of criminal pleading is that a count should contain but one substantive charge. An exception to the rule is where one offence includes another, and the former could not be charged without also charging the latter. In such a case the defendant may be convicted of either offence, provided always the allegations are sufficient.

CRIMINAL LAW—*Continued.*

If a pleader, in drawing up a charge under a statute, so enlarges upon it as to unnecessarily bring within the allegations, in one count, an adequate technical charge for another offence under another statute, the count is bad for duplicity.

The offence of cutting and stabbing under Act 44 of 1890 is contained in the similar offence under Act 43 of 1890.

The offence of inflicting a wound less than mayhem under Sec. 794 R. S., amended by Act 17 of 1888, is not contained in the offences under Act 43 of 1890.

The permissible joinder of cognate offences in different counts of the same indictment affords all the scope needful to present a change under its different aspects.

State vs. Jacques, p. 1451.

An indictment for murder is fatally bad which charges that two persons "in and upon one C D, unlawfully, wilfully, feloniously and of *his* malice aforethought did make an assault on him, the said C D, unlawfully, feloniously and of *his* malice aforethought did then and there kill and murder.

State vs. Jones, p. 1454.

JUDGE'S CHARGE.

In Louisiana the jury in a criminal case is judge of the law and evidence, and a person accused of perjury has the right to have submitted to it as one of the issues to be determined by it the materiality in the case in which it was given by the accused of the testimony assigned as perjury. When therefore the district judge declined to charge as requested, that "if the jury find from the evidence adduced upon the trial that the assignment of perjury on which a conviction is asked was not material to the issue, they must acquit the defendant," and in lieu thereof charged the jury that "if it find as a fact that the prisoner had made a false assertion, as charged in the information, that such assertion was material to the issue," he committed a double error. It is the duty of a judge to charge as to the law applicable to a case, but he must do so subordinately to the rights and power of the jury.

State vs. Spencer, p. 1.

CRIMINAL LAW—*Continued.*

Where the Supreme Court is called upon to review the refusal of a trial judge to submit special charges the bill of exceptions must either recite the particular state of facts upon which they are made to rest, or the charges must contain correct statements of general law. If they can not stand that test the judge's ruling will be sustained, it being his right, but not his duty, to qualify, limit or explain special charges.

It is not true as a general proposition that "one who is assaulted by another with a dangerous weapon is justified in taking the life of the person so assaulting him," nor that, "if 'A' assaults 'B' with a dangerous weapon, and 'B' believes his life in danger, and that he is in danger of great bodily harm, he is justified in shooting at 'A,' and that if in so doing he kills 'C' the killing is justifiable or excusable," nor that "when a person is assaulted by another with a dangerous weapon, and the person assaulted is in danger, or if he believes his life is in danger, and has reason to so believe, or that he will suffer great bodily harm, he is not bound to retreat, but may kill his assailant."

A charge to the effect that "it may be safely said that the bare fact that a man intends to commit murder or other atrocious felony without any overt act indicative of any such intention, will not excuse the killing of any such person by way of prevention" furnishes no ground of complaint to the accused.

An instruction that "in order to justify a homicide on the ground of self-defence a person must employ all the means within his power consistent with his safety to avoid the danger and avert the necessity, and he must retreat if retreat be practicable," is too broad. There are many cases where a person is not called on as stated to do either the one or the other.

A charge that "the fact that a person has deadly weapons, or even that he presents them, is not an excuse for killing him unless he manifestly intends to use them against the slayer, but where such intention plainly appears it affords grounds for the reasonable belief of imminent danger which will justify the killing," when taken in connection with other portions of the general charge to the effect that the homicide is excusable when committed in the actual and necessary defence of the life or person of the slayer, and "that menaces or gestures which do not constitute an assault, however irritating or provoking they may be,

CRIMINAL LAW—*Continued.*

will not excuse a homicide unless they show unequivocally an intent of the party making them to use a deadly weapon against the slayer," and that "an actual assault under circumstances which create a just apprehension of death or great bodily harm to another is adequate ground for that reasonable belief or fear of imminent danger or great bodily harm which will justify the killing of the assailant," placed higher than the law required of the accused the standard of the degree of certainty in the evidence upon which he was called to act at the time of the killing, and too high the standard of the correctness of the conclusions which he had to reach on that evidence. Such an instruction was calculated to injure the accused, although it was stated in the charge that in order to justify a homicide it must appear that the defendant at the time he caused the death of the deceased was acting under a reasonable belief that he was in imminent danger, and that it was necessary to act to save his life from a danger which was apparently imminent.

State vs. West, p. 14.

The trial judge gave a full statement of the statute under which the accused was prosecuted.

No objection was made to the charge and no instructions were asked.

The error charged is one which must be excepted to at the proper time. *State vs. Marqueze, p.* 41.

Where an accused has submitted no special charges to the trial judge—asked of him no written charge and taken no bill of exceptions in relation thereto prior to verdict, he can not, in a motion for a new trial, embody therein what he understands to have been the instructions of the judge to the jury, and require of the latter to state wherein they are not correct and to correct the same.

The trial judge can not be required to charge the jury in respect to a matter as to which he says there was no evidence whatever.

State vs. Brackett, p. 46.

When the requested special charge to the jury is, that "if from all the facts and circumstances the prisoner honestly believed his life was in imminent danger," same is fully responded to, and cov-

CRIMINAL LAW—*Continued.*

ered by the general charge, which declares that "if from the acts, declarations and conduct of the deceased, at the time, the deceased had reasonable ground to believe that his life was in immediate danger," and that "if he had apparent reason to believe, and did believe, that the deceased was about to make a violent attack upon him." *State vs. Joseph*, p. 903.

It is the duty of the court to instruct the jury upon every phase of the case made by the evidence. Where evidence is offered to prove a certain state of facts, and the claim is made that they are proved, the court should, if requested so to do, charge the jury what the law is as applicable to the facts claimed to be proved. State vs. Tucker, 38 An. 536, and 38 An. 789.

When a charge asked was applicable to the facts, as set forth in the bill of exceptions, and when the trial judge does not specifically deny such facts, but virtually admits the material ones by quoting them in hypothetical cases in his general charge, then it was the plain duty of the trial judge to have given such charge; and his opinion of the merits of the case is no excuse for not giving it. *State vs. Thompson*, p. 969.

Although special charges tendered by an accused may contain correct expositions of law, the court can not be called upon to submit them when there is no evidence in the case to which they are applicable; and on the other hand, even though a single sentence of a judge's charge may have stated too broadly a proposition of law, that fact would not justify a setting aside of the verdict where there is reason to believe that the jury was not misled, and that, as applied to the facts of the particular case, it was correct. *State vs. Jackson*, p. 1031.

The decisions in cases of State vs. Onmacht, 10 An. 198, and State vs. Mason, 32 An. 1218, affirmed and applied.

A special charge to the effect "that to find the accused guilty of murder, it is necessary that a malicious intent to kill existed at least five minutes before the killing," was correctly refused. There is no human gauge by which the duration of intent can be measured. If the killing was with the malicious intent to kill, the case was one of murder, although that malicious intention was formed at the moment of striking the fatal blow.

CRIMINAL LAW—*Continued.*

A charge which assumes that drunkenness is so inconsistent with malice that when shown to exist at the time of the killing, it becomes the duty of the State to seek for it at a period anterior to the drunkenness and to show affirmatively that the drinking was for the purpose of committing the deed, is palpably false.

State vs. Ashley, p. 1036.

It is only in case of gross and unambiguous error that this court will review the charge to the jury, if no objections were made at the time of its delivery and no bill of exceptions taken to the same.

State vs. Mack, p. 1155.

JURISDICTION.

This court has no appellate jurisdiction in a criminal case in which a fine exceeding $300 has not been "actually imposed," and in which the punishment of death or imprisonment at hard labor could not be inflicted. *State vs. Blanchard, p.* 939.

A justice of the peace has no jurisdiction over a municipal ordinance to enforce a penalty by fine or imprisonment for its violation.

State vs. Carreau et al., p. 1446.

JURY.

A correct list of the jury which is to pass on the case of defendant, drawn by the jury commissioner and served on him two entire days before the trial of his case and before the jurors are summoned, is a full compliance with the law.

Under Act 44 of 1877 the district judge has the power to order the drawing of tales jurors by the jury commission. It is no objection to the order that it specified the cases for which they are drawn. *State vs. Chambers et al., p.* 86.

Act 35 of 1880 is not in conflict with Act 29 of the Constitution of the State.

There is no connection between Act 35 of 1880 and Act 44 of 1877. The first is for the selection of jurors, at other terms than regular jury terms, to try cases provided for in Act 7 of the Constitution. The second act provides for the drawing of juries generally. *State vs. Wright et al., p.* 57.

CRIMINAL LAW—*Continued.*

Once a juror has been interrogated and cross-interrogated on his *voir dire* as to his qualifications as a juror, and the trial judge has decided that he is competent, this is the end of the matter, in so far as the trial court is concerned; and it is not admissible, except under extraordinary circumstances, for the defendant's counsel to reopen the question and investigate the question anew.

State vs. Donelon et al., p. 739.

Notwithstanding the proof shows that the general *venire* from which both the grand and petit juries were drawn was exclusively composed of persons of the white race, or of Caucasian descent, and did not contain a single colored person, or one of African descent, it does not furnish conclusive evidence of discrimination against the latter, on account of race or color, within the intendment of the Fourteenth Amendment of the Constitution of the United States, it being shown that only eighty names had been added at the term by the jury commissioners to the general *venire* for the purpose of keeping the general venire box up to the required maximum of 300.

State vs. Joseph, p. 903.

A juror who states that he has formed an opinion as to the guilt of the accused from talking with a witness for the State, but that he can disregard that opinion and render a verdict in accordance with the law and the testimony adduced on the trial, is a competent juror. State vs. Dugay, 35 An. 327, affirmed.

State vs. Covington, p. 979.

An immaterial and trifling variance between the copy of the *venire* that is served on the accused and the original jury list will not vitiate the service.

State vs. Rodrigues, p. 1040.

Sec. 7 of Act 44 of 1877 imposes no duty on the district judge as to requiring the jury commission to draw additional jurors as talesmen, but simply authorizes him to do so "whenever he thinks proper," and of course his refusal to make such order is final and not reviewable here.

CRIMINAL LAW—*Continued.*

The other bills of exception are based on statements embodied in the bills which are denied by the trial judge, who makes his own statements which entirely destroy the exceptions and which must be accepted by this court.

State vs. Forman, p. 1047.

A juror who on his *voir dire* states that he would qualify his verdict in all capital cases is an incompetent juror to serve on a jury in a case where the defendant is charged with murder.

State vs. Stewart, p. 1164.

A list of additional jurors drawn by the order of the court by the jury commissioners to supply deficiency of regular panel, to serve on defendant's case, must be served on him in accordance with Section 992, Revised Statutes.

State vs. Pollet, p. 1168.

In capital cases, where the jurors have separated and the sheriff, or his deputy, has failed to properly keep them in charge, abuse and misconduct will be presumed and the verdict will be set aside.

State vs. Foster, p. 1176.

The State has the right to have rejected as jurors parties who declare that under no circumstances would they render a verdict of guilty based solely upon circumstantial evidence, and to propound to jurors on their *voir dire* questions directed to the ascertainment of that fact. State vs. Shelor, 33 An. 994.

The overruling by the court of a challenge to the competency of a juror, who on his *voir dire* declared "that he had formed an opinion from rumor, and that it would take strong evidence to remove this opinion; that he had no bias or prejudice, like or dislike, for or against the accused; that he could render a fair and impartial verdict between the State and the accused, according to the law and the evidence on the trial without being in any way influenced by what he had heard, or the opinion he had formed, sustained." State vs. Ganz, 43 An. 367.

The refusal by the court to submit to the jury a special charge "that in cases depending upon circumstantial evidence it is but reasonable, in case of doubt, to expect that some motive, and that a

CRIMINAL LAW—*Continued.*

strong one, should be assigned as inducement to commit an act from which our nature is abhorrent, and the consequences of which is usually so fatal to the criminal," sustained.

State vs. Frier, p. 1434.

JURY COMMISSIONERS.

A jury commissioner having been sworn, and the oath having been lost, parol testimony as to the fact of the commissioner's having taken the oath is admissible in evidence.

The failure of the clerk of court to record the oath can not disqualify the commissioner. The fact of qualification is the test of the capacity of the commissioner to serve, and the failure of the clerk to reduce the oath to writing and to record the same can not defeat public justice by *interrupting* judicial proceedings.

State vs. Stewart, p. 1164.

LAW.

The ordinances of the city of New Orleans, where no power is conferred for that purpose, can not enlarge the statutes of the State.

A city ordinance inconsistent with and in conflict with the general policy of the State is illegal, null and void.

That part of Sec. 1, Ordinance No. 5046, which authorizes the imposition of a fine upon the husband or wife for neglecting to aid and support the family, the party not being charged with habitual drunkenness, is illegal, null and void.

State vs. Burns, p. 34.

In Louisiana all crimes are statutory, and the determination and definition of the acts which are punishable as crimes are purely legislative functions which can not be delegated to or exercised by the judiciary without violating Arts. 14 and 15 of the Constitution.

Section 869 of the Revised Statutes, which denounces and punishes as a crime any civil officer guilty of "any misdemeanor in the execution of his office," does not, on its face, define what acts shall constitute such misdemeanors, and unless there is some other law which defines them, it remits the definition thereof to judicial discretion, which is unconstitutional.

CRIMINAL LAW—*Continued.*

The 33d section of the Act of 1805 authorized a reference to the common law of England for the definition of the particular crimes therein enumerated; but neither that nor any law of the State has authorized reference to that system in order to ascertain the definition of any other crime not therein enumerated.

The omission in Sec. 976 of the Revised Statutes (which otherwise reproduces the 33d section of 1805) of the words "hereinbefore named" was not intended to extend or alter the meaning thereof so as to embrace all crimes and misdemeanors, however obscure or obsolete, known to the common law of England. The omission of those words without embodying an equivalent restriction was only a careless oversight, which was fortunately made clear by the final Sec. 3990, in which the 33d section of the Act of 1805 was expressly reserved from repeal, showing, beyond controversy, the legislative intent to maintain the law just as it was established by that section and had thereafter remained.

Held, therefore, that Sec. 869, Revised Statutes, which punishes "misdemeanors in office," without defining it or referring to any other law defining it, imposes on the judiciary the legislative duty of declaring what acts constitute the crime denounced, and thus violates Arts. 14 and 15 of the Constitution.

Whether logically or illogically, the judicial exposition of the 33d section of the Act of 1805 is to the effect that the *first* clause of the section only adopted the common law *definitions* of the particular crimes named in the act; while the *second* clause, relating to forms of indictment, method of trial, rules of evidence and proceedings, has been held to apply to crimes and offences generally. Our original opinion has simply followed this jurisprudence on the first point and has not disturbed it on the second.

The 33d section of the Act of 1805 was held not to be within the constitutional prohibition against the adoption of any foreign system or code of laws by reference, on the express grounds that this act was passed prior to the adoption of our constitutions, and that this provision should not be given a retrospective operation. If the contention of the State, that the Act of 1855 and Sec. 976, Revised Statutes, are new statutes extending the adoption of the common law beyond the 33d section and making it applicable to all crimes, were well founded, very grave questions would arise as to their validity under the Constitution.

CRIMINAL LAW—*Continued.*

No technical rules of precision in the definition of acts punished as crimes have been laid down. When the language used in the statute sufficiently and clearly indicates the legislative meaning and intent, these will be given liberal effect. But language of such wide and indefinite import as to leave absolutely uncertain what acts are within and what without the statutory prohibition can not operate as a valid criminal statute.

State vs. Gaster, p. 638.

So far as the right of the State to pursue and punish a criminal is involved, the subsequent ratification of the act by the party injured will not bar a prosecution by the State.

State vs. Frisch, p. 1283.

MINUTES.

An order fixing terms of court, if spread the same day it is rendered upon the minutes and read, is substantially "an order rendered in open court," although written and signed at chambers. *State vs. West*, p. 14.

NEW TRIAL.

In a motion for a new trial we will not notice complaints to the testimony of a witness, when they have not been objected to at the time and a bill reserved.

State vs. Wright et al., p. 57.

Evidence intended solely to impeach the credibility of witnesses who testified on the trial is not sufficient ground for a motion for a new trial.

State vs. Crenshaw, p. 496.

The object in applying for a new trial, on the ground of newly discovered evidence, was to impeach the credit of a witness.

The newly discovered evidence is cumulative, and if the new trial were granted, it would not likely produce a different result.

State vs. Hendrix, p. 500.

The presence of the defendant in court is not essential either on the trial of a motion for a new trial or one in arrest of judgment. The fact that on the trial of a motion for a new trial testimony

CRIMINAL LAW—*Continued.*

is taken on behalf of the defendant does not alter the case. There may be instances where counsel might desire the attendance of the client. In such cases counsel should so suggest to the court. *State vs. West*, *p.* 928.

In a motion for a new trial the unsworn statement of the accused as to newly discovered evidence is not sufficient. It must be corroborated. The granting of new trials is largely within the discretion of the trial judge, which will not be disturbed unless manifestly erroneous. State vs. Washington, 36 An. 341, affirmed. *State vs. Covington*, *p.* 979.

The ruling of the trial judge, disallowing a new trial, will not be examined and passed upon, unless a bill of exceptions is reserved to its refusal. *State vs. Rodrigues*, *p.* 1040.

To entitle an accused, as matter of right, to new trial, on the ground of nonage of a juror, he must prove affirmatively three facts, viz: (1) the fact of nonage; (2) that this fact was unknown to accused or his counsel until after the verdict; (3) that the juror was questioned as to his age on his *voir dire*, and falsely answered that he was of the age required by law.

The accused have the constitutional right to a trial by jury, by a jury of twelve men possessing the qualifications required by law, and when they show, by proof of the above facts, that they have been deprived of this right, notwithstanding the exercise of all due diligence to secure it, and by deception, they are entitled to relief, even after verdict.

The evidence in this case was reduced to writing, and is regularly brought up as part of the bill of exceptions taken to the judge's ruling refusing the new trial. There is no dispute as to the actual nonage of the juror and as to its discovery only after verdict, and the evidence of ten unimpeached witnesses who swear that they heard the juror questioned as to his age and his answer that he was twenty-two years old, can not be overcome or even shaken by the negative testimony of five witnesses who say they did not hear the question or answer though admitting the possibility that it might have been asked and answered and not heard, or, if heard, forgotten by them.

State vs. Nash & Barnett, *p.* 1137.

CRIMINAL LAW—*Continued.*

Not only error but injury must be alleged and shown to justify the reversal of a judgment.

State vs. Kennon, p. 1192.

SANITY.

Where subsequently to verdict and prior to sentence doubts arise as to the sanity of the person convicted the court has the right, upon the suggestion of the district attorney, to cause an investigation to be made on that subject.

Authority to that effect can be found in Sec. 1768 of the Revised Statutes, if direct authority for that purpose be necessary.

The judge is authorized to engraft upon the criminal proceedings in his court, not yet closed, the proceeding provided for in that section, and in the absence of a direct mode of procedure being exacted, to mould it to correspond with the analogous methods of proceeding resorted to for the purpose of the trial of special issues.

State ex rel. Chandler, etc., p. 696.

SEVERANCE.

It was not shown that the defences of the joint defendants were antagonistic. The plea for a severance was properly overruled.

State vs. Taylor et al., p. 605.

TRIAL.

It is not sufficient for an accused to object to what occurs in the trial court—he must state the grounds of his objections and embody them in his bill of exceptions.

The verdict of a jury and the judgment therein will not be set aside for every error which may have been committed—there must be error (either proved or legally inferable) to the prejudice of the accused.

When accused complaining of the action of the district judge in permitting one of his witnesses to be recalled after both sides had closed their case, and a basis to be then laid for his impeachment, assigns as his ground of exception that the State in recalling the witness made him its own witness and could not legally impeach him, he must show that when impeaching testimony was offered under the basis so laid, he had objected for

CRIMINAL LAW—*Continued.*

the reason assigned, and the testimony was allowed over his own exception. The action of the court only became prejudicial through testimony received without objection, which on his own theory he could have legally resisted.

State vs. Wiggins, p. 416.

In a judicial district in which there are three parishes three weeks should intervene between the opening days of the court's sessions.

Non-compliance with the law in this respect, in so far as relates to another parish of the district than that in which the defendant was indicted, is not an irregularity of which he can avail himself.

There is no irregularity in the terms of the court in the parish in which he was tried and condemned.

State vs. Stuart, p. 659.

The appointment of triors is not a matter of right.

The refusal of a motion to appoint triors does not vitiate the verdict of a jury. *State vs. Porter*, p. 661.

An assignment of error presents points of objection arising on the face of the papers, which must be examined and considered as a whole.

Minute entries kept of the proceedings are intended to preserve a faithful and exact record of what happened at the trial, as well as of the facts and occurrences antecedent to the trial, and same will be accepted as the correct and proper evidence of what *did* happen in the lower court.

State vs. Perkins et al., p. 689.

Where the terms of court in a parish in which an accused has been indicted and tried are conformable to law he has no legal concern in those in the other parishes of the judicial district, which in no way affect his rights.

The action of a district judge in fixing the terms of his court under legal authority so to do can not be collaterally drawn in question after verdict on a motion in arrest of judgment. That action should have been made the subject of a direct attack at an earlier stage of the proceedings. *State vs. Powell*, p. 694.

CRIMINAL LAW—*Continued.*

Without a bill of exceptions, although the ruling and the evidence adduced appear upon the face of the record paper, the refusal of a new trial by the court is not properly before the appellate court for review.

Orders to separate witnesses, and their enforcement, are generally addressed to the sound discretion of the lower court.

State vs. Hagan, *p.* 839.

It is not sufficient proof of misconduct of a juror to justify the setting aside of the verdict of the jury, that he had taken, during the progress of the trial, a memorandum of parts of the testimony of some of the State's witnesses, it fully appearing that same was not exhibited to other members of the jury, and was destroyed by him without making use of it himself.

Neither precept of law or precedent in our own reports justifies the request of the defendant that the State's counsel shall make written answer to a motion to quash an indictment, either admitting or denying the allegations thereof.

Under exceptional circumstances it is permissible for the trial judge to correct a statement of fact in a bill of exceptions after same has been signed and filed. *State vs. Joseph*, *p.* 903.

Absence of counsel for the prisoner, when the case is regularly called for trial, is no bar to proceeding when the prisoner expresses his readiness and consent thereto, and this furnishes no legal grounds for a new trial.

State vs. Williams, *p.* 936.

The entry as made, noting the presence of the accused, makes it evident that he was present during every important stage of the trial.

State vs. Nickleson, *p.* 1172.

VERDICT.

When three parties are indicted and two of them have been arrested and tried, a verdict of guilty has reference only to the two on trial. It was not necessary for the jury when returning the verdict to refer to the two defendants on trial as the parties to be affected by the verdict.

State vs. Chambers et al., *p.* 36.

CRIMINAL LAW—*Continued.*

In an indictment charging the defendant in two counts with burglary and larceny, growing out of the same transaction, a verdict of "guilty as charged in the indictment" is a sufficient basis for a sentence for the burglary.

State vs. Crenshaw, p. 496.

The Supreme Court will not set aside a verdict on the ground that the attorney for the prosecution made statements to the jury not warranted by the evidence.

In such a case it is the duty of the trial judge to confine the attorney to within proper limits. But this is a matter relating to the discipline of the inferior court, with which this court will not interfere.

It is not necessary in a criminal case when the jury returns a verdict in writing, for it to be written in ink.

A verdict which finds the prisoner at the bar guilty as charged is responsive to the indictment. It is not necessary that each defendant should be named.

State vs. Anderson et al., p. 651.

A verdict of "guilty with mercy of the court" will be held to be one of "guilty of manslaughter" in a case where the accused, having been indicted for murder and convicted of manslaughter, had succeeded in having the verdict and sentence set aside and was placed on trial a second time under the original indictment, but with an announcement from the district attorney and a charge from the court that the prisoner was only on trial for manslaughter. Accused will not be listened to in claiming (for the purpose of setting aside the verdict) that the verdict was one of "guilty of murder" and therefore not responsive to the charge actually advanced by the State.

State vs. West, p. 928.

The accused was charged with burglary armed with a dangerous weapon.

He was found guilty of burglary without a dangerous weapon.

The verdict finds all the circumstances which constitute the offence under Sec. 880 of the Revised Statutes, except that the accused was not armed with a dangerous weapon, an offence denounced under Sec. 851 of the Revised Statutes.

CRIMINAL LAW—*Continued.*

The offences are cognate, the latter, the minor, is included within the terms of the major.

The verdict is responsive and warrants a judgment.

State vs. Miller, *p.* 1170.

Where the defendant was being tried for an assault with intent to ravish, and the deputy sheriff in charge of the jury, on being informed that the jury stood 11 to 1, said to the juror opposed in opinion to the other jurors: "Why, John! Plain case," *Held:* That the verdict of "guilty" brought in by the jury was vitiated by the misconduct of the deputy sheriff.

State vs. Langford, *p.* 1177.

Section 790 R. S., as amended by Act 24 of 1882; Section 791 R. S., as amended by Act 43 of 1890, and Act 44 of 1890, are harmonious parts of one subject of criminal punishment.

The offences denounced by Act 44 of 1890 are contained in Act 43 of 1890, and the offences denounced by the latter are contained in Sec. 790 R. S.

An information properly drawn under Sec. 790 R. S. contains accusations under all three of said statutes, to-wit: Sec. 790 R. S., Sec. 791 R. S. and Act 44 of 1890.

A verdict under Sec. 793 R. S. is not responsive to an accusation under any one of said three statutes.

State vs. Price, *p.* 1430.

CUSTOM.

Evidence to prove custom was properly admitted.

Custom or usage may be proved, not only to explain the meaning of the terms to which is affixed a peculiar and technical meaning, but also to supply evidence of the intention of the parties regarding matters of which the contract itself affords indication, or it may be no indication at all.

The defendant bound itself to pay tolls on all timber towed to its mill through plaintiff's canal; the measurement to be ascertained by reference to "Doyle's Rule Tables," as published in Scribner's "Lumber and Log Book," at charge of twenty cents per thousand, of inch board measure.

CUSTOM—*Continued.*

The contract does not indicate the method to be followed in measuring a log; whether by its "average diameter" or by taking the diameter of the small end.

Board measure is the number of feet a log will yield when sawed.

When sellers of logs and those who have a right to collect toll on them do not choose to express their intention, in the contract, as to the mode of establishing the board measure, custom and usage furnish an explanation of the unexpressed intention.

The contract contains no stipulation about deductions for hollow or peeky logs; custom was consulted to fix the amount due on board measure.

The receipt of payment of toll on logs without stipulating that toll shall be paid on the steamboat or tug by which they were towed precludes the right of collecting toll on the steamboat or tug.

Destrehan vs. Lumber Co., *p.* 920.

DAMAGES.

In a suit for damages the plaintiff must prove his damages with legal certainty.

Where the testimony is conflicting we will not disturb the judgment of the lower court without a manifest injustice has been done.

Before a party can resort to prove what disposition was made of property seized, he must first show that it was legally sold under an order of court, by agreement of the parties, or under a *fi. fa.*, and the loss or destruction of the authority under which it was disposed of.

Payne vs. James & Trager, *p.* 381.

Repeated decisions have settled the law of Louisiana to the following effect: that under Art. 665 of the Civil Code, riparian property on navigable rivers is subject to a servitude or easement imposed by law for the public utility, authorizing the State, under proper laws, to appropriate the space required for the making of levees and roads; that, in locating and building levees, the State does not expropriate property, but lawfully appropriates it to a use to which it is subject under the title itself; that in so doing she acts, not under the power of eminent domain, but in the exercise of her police power; that laws, constitutional or statutory, concerning expropriation of property and requir-

DAMAGES—*Continued.*

ing compensation therefor, have no application to property legitimately taken for levee purposes; and that private injury resulting therefrom is *damnum absque injuria*.

The statute constituting the defendant levee district expressly dedicates all its funds exclusively to drainage and levee construction; authorizes it to construct only such levees as are approved by the State Board of Engineers, devolves on the State Engineers the exclusive authority and duty to locate levees, and charges them with all the responsibility for such location.

The defendant commissioners, having built its levee on the line located by the State Engineers, have only performed the plain duty imposed on them by law, and can not be held in damages by a citizen claiming to be injured thereby. If there has been fault it was committed by the State Engineers. The corporate funds could, in no event, be diverted from the public purposes to which they are exclusively dedicated by law. The commissioners, if desirous to do so, could not appropriate them to payment of such damages without violating the law, and judicial power can not be invoked to compel them to violate the law.

The law being valid, no acts of officers within the authority conferred can give rise to any legal damage; and if they have acted without and beyond such authority, their acts are not binding on their principal, which is a mere functionary of the State, and any liability incurred must be personal.

Whatever remedy the plaintiff may have had to prevent unlawful action by these officers it can not take the shape of an action for damages against this corporation, which is the only question here involved.

Peart vs. Levee District, p. 421.

Any regulation the carrier may adopt, the effect of which would be to unjustly release him from that utmost care and diligence the law requires, is nugatory.

The conditions of a ticket may be waived by an authorized officer.

The written extension of the time to return on a ticket endorsed before it had expired will be given effect unless it is established that the extension was subject to certain conditions or contingencies.

The company had no right to eject the passenger.

DAMAGES—*Continued.*

In order that there may be a foundation for an action, the wrong and damage must be in sequence; if not in sequence the damage will not follow from the wrong, the wrong and the damage not being sufficiently conjoined as cause and effect.

Damages are allowed for the ejectment only.

As to the other causes alleged, it is rejected.

Randall vs. Railroad Co., *p.* 778.

Under the law of Louisiana libel is a *quasi* offence, actionable under the broad provision of the code, "Every act whatever of man that causes damage to another obliges him by whose fault it happens to repair it." Spotorno vs. Fourichon, 40 An. 424.

Our courts are not bound by the technical distinctions of the common law as to words actionable *per se* and not actionable *per se*. Miller vs. Holstein, 16 La. 389; Feraz vs. Foote, 12 An. 894; Spotorno vs. Fourichon, 40 An. 424.

The extent of damage to credit is an inferential fact arrived at only by an examination of all the circumstances in a case and can not be the subject of direct proof. Damages or injury may be inferred from the nature of the words written and from the circumstances under which they were written without the necessity of special proof. Miller vs. Holstein, 16 La. 389; Daley vs. Van Benthuysen, 3 An. 69; Tresca vs. Maddock, 11 An. 206; Cass vs. N. O. Times, 27 An. 214; Spotorno vs. Fourichon, 40 An. 424.

Warner vs. Clark & Co., *p.* 863.

The proof disclosing that plaintiff's daughter had eloped with a young man, at night, on foot, and alone, and that they passed the latter half of the night at a stranger's house, together, the defendant was justified in stating to a party of friends, who had been called together in consultation in regard to the matter, the nature and character of certain rumors that were in circulation in the neighborhood in reference to her improper intimacy with the person with whom she had eloped, as a reason that induced him to believe that they should immediately get married in case of their capture by the parties in pursuit of them at the time.

Such a statement is utterly wanting in malice, the essential ingredient of defamation and slander.

Lester vs. Corley, *p.* 1006.

DAMAGES—*Continued.*

A passenger on a railroad train, when it stops at the station where he is to get off, and where he attempts to do so and is on the steps of the car, and the train moves ahead when he is in this situation, he is compelled to adopt a perilous alternative, to run the risk of being thrown from the train when its speed is accelerated, or to leave the train with less speed. In trying to escape imminent danger brought about by defendant's negligence, he is not guilty of contributory negligence, and the defendant corporation is responsible for its negligence.

Odom vs. Railroad Co., *p.* 1201.

The husband who joins and aids his wife in committing a tort in an illegal sequestration proceeding instituted to recover her paraphernal claim is bound *in solido* for the damages occasioned.

A sheriff acting under the direction of a court of competent jurisdiction and carrying out its orders is not responsible in damages.

Prescription runs from the day the injury or damage was sustained.

Damages for expected profits must be clearly established.

Crow et al. vs. Sheriff et al., *p.* 1221.

In the absence of satisfactory and clear proof of malice and want of probable cause for the prosecution, no recovery can be had for indemnity—both being the essential ingredients of a malicious prosecution.

Courts of justice will not inflict damages on a party who, in good faith, resorts to the laws for the protection of his legal rights rather than have recourse to arms.

Garnier vs. Bernard, *p.* 1265.

The locomotive of a stationary train at Cade, one of the stations of the defendant company, having been detached, returned shortly after with freight cars, which the employés of the company coupled to those which had been left standing on a side track. The coupling caused a considerable jolt and moving of the cars, which, under ordinary circumstances, would not have been dangerous to grown persons standing upon the platform of the passenger coach. On the particular occasion a child of two years and eleven months was standing upon the platform. The jar caused it to be thrown down and to fall between the opening between two

cars. The mother, a passenger, who was inside the coach, ran out, jumped to the ground, and thrusting her arm under the car saved the child, but in so doing her own arm was caught under one of the wheels and badly broken. The present suit is for damages for her injuries. The action is grounded upon the charge that the defendant was guilty of gross and wanton negligence in not having built a station house at Cade station, and upon a charge of negligence on the part of the officers and employés of the company in not having notified the passengers of the approach of the coupling cars. The conductor had, in a tone loud enough to be heard, told passengers to keep their seats, but he had not specially warned them not to go upon the platform, nor did he give them notice that the cars were about to be coupled.

Held—That the failure of the company to build a station house was a fact too remote to furnish a ground of action in this case. It was not the proximate cause of the accident; that the accident was due solely to the fact that a child of such tender years was standing where she should not have been, upon the platform of the coach; that but for such exceptional facts, which the conductor could not reasonably be expected to have anticipated, neither the coupling of the cars nor a position on the platform would have been attended with danger; that the coupling was such as is habitually made at Cade station whilst waiting the arrival of the train on the main road; that the employés were at their respective posts for such work, and that the concussion from the coupling was not greater than was usual, nor unreasonably violent; that however deplorable the accident the defendant can not be legally held responsible for it under the circumstances.

The declaration of the person injured, made at the moment of the accident, that she alone was to blame for it, should have been permitted to have been proved as part of the *res gestæ*.

DeMahy vs. Railroad Company, *p.* 1330.

An ordinance of the city of New Orleans stipulating in the grant or ranchise of a street railway company to be operated on St. Charles avenue, between Canal street and Carrollton, as the termini of its track, that it may charge to persons residing *below* Napoleon avenue a *double* fare from Canal street to Car-

DAMAGES—*Continued.*

rollton, while permitting persons who reside *above* Napoleon avenue to travel the whole distance for a *single* fare, is not subject to attack as an unreasonable discrimination prohibited by the law governing the obligations of common carriers.

Robira vs. Railroad Company, p. 1368.

When property is held under conservatory writs on final judgment no damages can be claimed for the detention of the property under the writs.

When a suit is instituted by an administrator in good faith, without malice and with probable cause for the protection of a succession interest, and the administrator feels no damages can be claimed from the succession by the defendant for expenses incurred in defending the suit.

Louque vs. Succession of Saloy, p. 1386.

Claim being made for damages resting upon an alleged tort, and the proof disclosing that they grew out of an illegal provisional seizure of the plaintiff's property, as that of a corporation of which he was a shareholder, director and vice president, and of which corporation he had previously become a sub-tenant of the defendant's property—*held*, that the purposes of justice will be best subserved by the affirmance of a judgment for nominal damages in favor of the plaintiff. *Scott vs. Moll*, p. 1401.

DIVORCE.

See Marriage.

DOMICIL.

Domicil is acquired by the combination of residence and the intention to reside in a certain locality.

If the intention of permanently residing in a place exists, a residence in pursuance of that intention, however short, will establish a domicil. *McLean vs. Janin*, p. 664.

Where a party has removed from one parish to another, but has not made a formal declaration of his intention to change his domicil, if a year has not elapsed since his removal it is optional with a party desiring to sue him to bring the suit in either parish.

DOMICIL—*Continued.*

In cases of ambiguous domicil a presumption attaches in favor of the continuance of the former domicil, and if a party so acts as to leave it doubtful in which of the two places he resides, parties interested may sue him at either.

Ausbacher & Co. vs. DeNevue, p. 988.

DONATIONS.

Accretion is based upon the theory that the title to the thing bequeathed is conveyed in its entirety to each and every one of the legatees named, and that hence when one or more of the legatees dies before the legacy vests, this fact leaves the title intact in each of the survivors in its entirety, but with simply fewer persons to share in it on partition. The word accretion is not strictly exact, it should rather be non-decretion.

Where a testator, after appointing testamentary executors "with seizin of his (my) estate to administer and apply the same as hereinafter written, viz.: all and every sum of money of which I die possessed, and all and every article of value pertaining thereto which may accrue to his (my) estate," next makes nine separate legacies of $1000 in gold to each of nine persons, closes his will with the clause "I desire should any money or aught of value accrue to my estate from any claim exhibited in the papers which I leave or otherwise, that the same be paid severally and proportionally to the persons named and stated in this paper, to whom I leave cash in gold," three of the special legatees die before the testator there is no room for the application of the doctrine of accretion. The will contains no "disposing clause" of the remainder, which is referred to by way of payment to and distribution, and not by way of bequest. The "title" to the remainder never vested in the nine legatees or any of them.

The clause can only be considered from the standpoint of a "payment," and when so considered the testator obviously directed that each of the nine special legatees should separately receive one-ninth of the remainder after payment of the special legacies, debts, charges and costs.

The six survivors neither gained nor lost by the death of the three others, and the lapsed legacies devolved on the legal heirs.

Succession of Hunter, p. 262.

DONATIONS—*Continued.*

Where a wife who has made a donation *inter vivos* of all her property to her husband without reserving anything in the act for her subsistence, dies without having either revoked or attacked the donation as being violative of Art. 1497 of the Civil Code, the right of attack does not pass to her collateral heirs, but dies with her.

Bernard vs. Noel, p. 1135.

ELECTIONS.

Art. 185 of the Constitution in fixing the qualifications of electors has reference to the acquisition of the right to vote, and does not furnish an inflexible rule under which that right, when once gained, should be held to have been lost.

The right when once gained is subject, of course, to be lost by absence—absence unexplained is a fact which enters largely in the determination of a question of that character, but absence is not always and necessarily the controlling factor.

An absence which a party all the while intended as merely temporary, to be and actually followed by resumption of the former residence, will not be considered an abandonment of the former residence.

Voters may accept the registrar's *de facto*, as they accept the commissioner's *de facto*. and they are no more forced to inquire into the qualifications *de jure* of the registrar than the qualifications *de jure* of the commissioners.

Although it is grossly irregular and improper in a registrar of voters to place his registration books in the possession and under the control of persons not legally authorized to register voters, it does not follow that where such parties have under verbal authority from the registrar registered persons unquestionably entitled to vote, that the latter should be considered as not having been registered at all, and that their votes should be held illegal and thrown out. Irregularity of registration and utter absence of registration are different things.

Where registration has been carried on under verbal authority from the registrar by persons not having legal authority so to do, and there is no charge of fraud or discrimination against any voter—no allegation of injury actually resulting—no attempt to challenge the voters so registered or to purge the registration

ELECTIONS—*Continued.*

books, voters actually entitled to vote can not after the election be deprived of their constitutional right to have participated therein, by the simple fact of itself, that the person who registered them was not legally authorized to do so.

Legal voters can not be forced to disclose the names of the persons for whom they voted.

The requirements of the third paragraph of Art. 185 of the Constitution as one of the qualifications for a voter that he should be an actual resident of the word or precinct in which he offers to vote at least thirty days next preceding the election is as imperative as that of being an actual resident of the parish for six months and of the State for one year, but where, as a matter of fact, there is the greatest uncertainty as to where the ward lines really are, the court would not feel justified in disturbing the vote as cast, particularly where parties have registered after due inquiry upon the advice of the registering officers, and where the office voted for not being a ward office there is no reason for imputing any wrong motive in the selection of wards.

The decision of the court of the first instance upon a question of fact prevails unless manifestly erroneous.

Tullos vs. Lane, *p.* 333.

ESTOPPEL.

The attaching creditor of one who appears on the books of a corporation as registered owner of shares of its stock can not hold the stock against the true equitable owner who holds the certificate of stock duly indorsed by the debtor.

No estoppel arises to prevent the true owner from asserting his title. His permitting the debtor to appear as holder on the books of the corporation did not invest the latter with such *indicia* of title as could prejudice third persons, because he could not sell or dispose of the stock without producing the certificate.

Kern vs. Day, *p.* 71.

The condition of the contract was that the contractor would be paid from a special fund, if voted on favorably by the voters at a special election.

The contractor can not recover judgment against the defendant parish and ignore the means agreed upon to secure his payment.

ESTOPPEL—*Continued.*

The special election was ordered and held in contravention of a prohibitory law, and was null and void.

A municipal corporation can not be estopped from pleading and showing that certain acts were not within the scope of its authority.

The doctrine of estoppel in its application to municipal corporations is subject to restrictions and qualifications.

The question being one of original power to hold a special election, and not one relating to the compilation of the votes and declaring the result, is not one exclusively within the discretion of the police jury. It is subject to judicial inquiry and decision.
Byrne vs. Parish, p. 392.

In a pending suit, where a judgment creditor of the plaintiff seizes all his right, title and interest in the suit, to which seizure no opposition is made, and the suit is prosecuted to final judgment, the seizing creditor is alone interested in it, and the suit is prosecuted for his benefit. He is therefore bound by the decree and can not afterward set up rights adverse to the property in whose favor the decree was rendered. *Bank vs. Miller et al.*, p. 493.

There is a difference between "estoppels" which preclude the advancing of a claim at all, and "admissions by conduct," or "presumptions arising from conduct," which only render difficult of proof, pretensions inconsistent therewith.

Estoppels may be waived or renounced by permitting evidence covering the whole ground to be received without objection.

If a husband actually hold and possess as owner property at the date of the second marriage, the fact that he may hold it unduly does not preclude him as between himself and his second wife from claiming it as his own. The origin and source of the property does not concern her; it is enough that it does not belong to her and the second community. *Imhof vs. Imhof*, p. 706.

In its application to municipal corporations particularly, the estoppel pleaded must be unequivocal and certain.

The terms of the contract between plaintiff's and defendant's assignor and the statutes, made the official promulgation of the returns of the special election a condition precedent to any ordinance by the council levying the special tax.

ESTOPPEL—*Continued.*

Prior to the promulgation giving sanction to the election as held, the tax-payers can not be compelled to pay the special tax.
Construction Co. vs. Mayor et al., p. 1024.

EVIDENCE.

Where the notary before whom a marriage contract is alleged to have been executed, and which contract is averred to have been destroyed by fire, deposes that he remembers perfectly the act and its execution—that it declared that the parties thereto were about to be married, and that in view of the contemplated marriage had agreed that there should be no community between them; that the act was passed by him, duly signed by the parties and duly witnessed and recorded, proof of the fact that the parties were not married when the act was passed rests upon the recitals of the act of which the notary testifies he has a distinct recollection. These recitals bind both the parties and their heirs to their verity. The force of this testimony is not weakened because at another point in his testimony he stated that he knew the parties were not then married, because they came together to his office before the act was passed and told him they were about to be married, and the character of the act they desired passed. This fact, together with others specified, were simply explanatory of the vivid recollection of the witness of this particular act.

If a marriage contract be proved to have been executed before the celebration of the marriage, the precise day of its execution is immaterial. Time is of the essence of the contract only with reference to its being prior to the marriage.

In the contest between the heirs of a wife and those of a husband, where the plaintiffs and defendants are all children of the same mother, though by different husbands, the issue being whether or not the second marriage was contracted under a marriage contract, the declarations of the wife during the second marriage that such was the fact are admissible in corroboration of the testimony of the notary before whom the contract is alleged to have been passed, to the effect that such a contract was executed before him. A proper foundation for the introduction of secondary evidence, as in the case of a destroyed instrument, having been laid, the testimony of the notary and the declarations of the wife were both admissible.

EVIDENCE—*Continued.*

The husband of one of the heirs of a succession can testify for or against a co-heir touching the latter's interest in the succession. Boisse vs. Dickson, 31 An. 741.

Although the judge may have charged improperly, yet, if the evidence would not have authorized a different verdict, it will be upheld. 7 An. 778; 10 An. 150.

As an act bad for one purpose may be good for another, the judgment rendered in a case may be pronounced an absolute nullity for want of jurisdiction, and yet the record therein may be legally admissible in another suit. The pleadings may contain admissions, or the rights of parties may otherwise be legally affected.

A court can not assume, for the purpose of excluding from being admitted in evidence, the record of a suit in which a wife appears as a plaintiff, acting in her own interest and adversely to her husband, that the suit is really one in the interest of her husband; that the allegations of the petition are admissions in favor of her husband and really his own allegations. Charges to that effect can not be brought to bear by the way of objection to evidence. The court was not called on to stop the trial of the case and try separately issues raised by such objections.

Starns et al. vs. Hadnot et als., p. 318.

A written agreement, intended to evidence a final settlement of accounts, which is prefaced by an enumeration of various properties owned by contracting parties jointly and separately; and which contains a statement to the effect that an undivided one-half interest in each is to be transferred to the other, so that "each will own an undivided half interest" in all, taken as a whole is rather to be given the effect of a confirmative or recognitive act, explanatory of the *status* of the property, than that of a new title which is coupled with a condition, or depending for its completion upon the happening of a future and uncertain event.

Upon this recognition of title a suit may be brought by either party for a partition of the common, or partnership property.

Murphy vs. Murphy, p. 433.

EVIDENCE—*Continued.*

Where an agent is authorized to sell and dispose of certain lands, and he exchanges them for other lands, the principal ratifies the act if he sells the lands which his agent received in exchange.

A copy of a copy of an authentic act is inadmissible in evidence, unless the original is alleged and proven to be lost and that a copy thereof can not be obtained.

Where a party disposed of lands in his lifetime and the deed was recorded in the parish in which they were situated, and these lands afterward became a part of a new parish and the act of sale was not recorded in the new parish, the heirs of the deceased can not claim title to said land on account of the failure to record the deed in the new parish.

Chambers vs. Haney et als., p. 447.

Parol evidence of verbal agreement by the mayor, when the contract is set up as creating title to immovable property, is inadmissible.

City of Baltimore vs. City of New Orleans, p. 526.

Interrogatories should be filed with the affidavits for a commission to examine witnesses out of the State, or the materiality of the testimony sought should be shown by the oath required.

Parol is inadmissible to prove that the person whose name appears in the deed was only the agent and not the purchaser.

Interrogatories on facts and articles are the safer method of securing a confession against the vendee, establishing the transfer of immovable property.

The testimony of witnesses, admitted by the district judge, is considered, without regard to this rule, to probe the conscience of a vendor or vendee of real estate; its preponderance supports the written deed.

The title was recorded several years ago. Upon parol testimony it can not be decreed that the owner named in the deed is not the owner, but a creditor for the amount of the purchase price.

Steirle vs. Kaiser, p. 580.

A plaintiff who closes his case on insufficient evidence, relying upon supplementing it by letters then in his possession, to be offered in rebuttal to testimony which he assumes will be introduced by the defendant, can not claim as a right to reopen the case for

EVIDENCE—*Continued.*

the purpose of placing as he states all the facts before the court when the defendant is content to rest his own case on the testimony offered by the plaintiff. The action of the court on such a request rests upon the discretion of the trial judge, who properly exercised that discretion in the present instance in refusing the application.

Liquor and Tobacco Co. et al. vs. Jefferies et als., p. 921.

If a plaintiff have documents in his possession legally admissible *per se* in behalf of the defendant, it is no good ground for not producing them that by reason of his incompetency as a witness he may not be able to give his own testimony or explanation of them.

A defendant who during the progress of the trial calls for books or papers in the possession of plaintiff must conform to the requirements of Art. 130 of the Code of Practice.

Imhof vs. Imhof, p. 706.

When a person takes property on deposit, and sets up title to the property when it is demanded, and when sued for the property alleges that it had been destroyed by fire, his unsupported declaration may be disregarded.

McGuirk vs. Marchand, p. 782.

Where, in consequence of an erroneous survey of a cultivation and settlement right which called for a location of six hundred and fifty acres on the Tangipahoa river, the land has been located in wrong sections, township and range, and by wrong numbers far to the east and away from the river, the owner in granting a mortgage on the property described it as a tract of six hundred and fifty acres on the Tangipahoa river, but assigned to it the numbers of the sections, towhship and range given in the survey, the error was not fatal, and when subsequently on discovery of the error the government resurveyed and properly located the land, the resurvey and new location bound the owner and inured to the benefit of his mortgage creditor. There was in this no change in the thing mortgaged, no substitution of one tract for another, but a mere yielding of some incorrect calls by replacement to bring them to conform to others which having been correct all the time, were not altered but adhered to by the government.

EVIDENCE—*Continued.*

Parol evidence to establish identity is allowable, as is likewise parol evidence of possession in aid of a defective or ambiguous description of land in an act of sale, but this is only where there is a sufficient body in the description to leave the title resting substantially on writing and not essentially on parol. A written title with a reasonable degree of certainty of description has to be produced. *Kernan vs. Baham et als.*, p. 799.

The rule that parties raising objections in the lower court must, at the trial, state their particular grounds of objection—the materiality of the action complained of and the reasons of the judge for his rulings, has not been superseded by the statute authorizing objections to be noted in lieu of a bill of exceptions. Parties must still disclose everything necessary to enable the appellate court to say that the court below erred.

A plaintiff may, for the purpose of proving the allegation of his petition that he has suffered special and general damage as the result of certain letters written and sent out by the defendants, question the parties who received the letters or heard their contents discussed, as to the effect produced upon them by the letters, such evidence not being offered to prove the meaning of the words used nor the innuendo charged, but the substantive fact of damage sustained.
Warner vs. Clark & Co., p. 863.

Parol testimony can not be received to establish title to immovable property. But where the records have been exposed to fire, some destroyed and others saved in a damaged condition, the vendor's testimony can be received to supply the obliterated parts of the deed. *Landry vs. Landry*, p. 1113.

The value of the right involved is within the jurisdiction of this court, as alleged and supported by the inventories taken of the assets of the succession.

If heirship be specially denied it must be proved in order that the heir may maintain his action.

A notary public before whom a will was executed may be examined as a witness in opposition to testimony admitted to impeach the verity of his act.
Solari et al. vs. Barras et al., p. 1128.

EVIDENCE—*Continued.*

Held—That the failure of the company to build a station house was a fact too remote to furnish a ground of action in this case. It was not the proximate cause of the accident; that the accident was due solely to the fact that a child of such tender years was standing where she should not have been, upon the platform of the coach; that but for such exceptional facts, which the conductor could not reasonably be expected to have anticipated, neither the coupling of the cars nor a position on the platform would have been attended with danger; that the coupling was such as is habitually made at Cade station whilst waiting the arrival of the train on the main road; that the employés were at their respective posts for such work, and that the concussion from the coupling was not greater than was usual, nor unreasonably violent; that however deplorable the accident the defendant can not be legally held responsible for it under the circumstances.

The declaration of the person injured, made at the moment of the accident, that she alone was to blame for it, should have been permitted to have been proved as part of the *res gestæ*.

DeMahy vs. Railroad Company, p. 1265.

Notes given by the husband to the wife for her paraphernal funds used by him are admissible to prove the indebtedness of the husband to the wife. *Delesdernier vs. Delesdernier*, p. 1364.

Entries on the note of evidence made in the performance of his duty by a public officer in the performance of a duty are *prima facie* evidence of the facts stated.

A claim for taxes was decreed due and ordered carried on the executor's account as a debt of the succession.

The evidence upon which the District Court rendered judgment, in so far as relates to this claim, was not transcribed in the record of appeal.

In the incomplete state of the record, the opposition, in so far as relates to this claim, is dismissed and the rights of opponents reserved.

Where the patient being feeble and in a nervous and delirious state required attention entirely unusual, and the services were skilfully and faithfully rendered.

EVIDENCE—*Continued.*

Where surgical operations were performed and extra time was devoted by the physician in endeavoring to relieve the patient from his sufferings, which were intense—held, that the performance of the operations and the time, in addition to the regular visits, were within the scope of the physician's authority.

The testimony of honorable physicians sustain the correctness of the judgment appealed from, in respect to this claim, and the court agrees with the District Court in the reduction made, and that in all other respects the proof fully sustains the charges made.

Succession of Short, p. 1485.

EXECUTION.

In case a judgment creditor causes property standing in the name of another to be seized and advertised for sale as that of his judgment debtor, he undertakes the burden of proving the title of such third person to be a simulation.

But if such third person's title emanates from the judgment debtor, who is suffered to retain actual possession, under a precarious title, there is reason to presume the sale is simulated, and the burden of proof is on such purchaser to show that the transaction was in good faith and establish the reality of the sale.

In this latter event the burden of proof is sufficiently discharged by the production of a judicial title supported by confirmatory and corroborating circumstances of contemporaneous date.

Yale & Bowling vs. Bond & Williams, p. 997.

Injunction to restrain the execution of an order of seizure and sale by the debtor, only lies in cases prescribed by Art. 739, C. P.

The legal representative of the deceased debtor stands in the latter's shoes and has no other or greater rights than his.

Insufficiency of the authentic evidence on which the order issued is no ground for injunction; the remedy is by appeal.

Inability to furnish a suspensive appeal bond furnishes no title to relief by injunction.

Dupre vs. Anderson, p. 1134.

EXECUTORY PROCESS.

The burden of pleading does not devolve upon the defendant unless he has a special defence.

EXECUTORY PROCESS—*Continued.*

Sued as a "third possessor," the defendant pleaded affirmatively, and alleged *inter alia* that the mortgage claim of plaintiff did not attach, for causes assigned, to the properties plaintiff seeks to have sold.

Though the descriptive allegations were not as clear and complete as they should have been, notice was given to the opposite party of the grounds of defence, and it furnishes ample evidence in all future controversies of what was decided on the issues presented.

The ruling of the District Court admitting the testimony remains.

The notice of demand was signed by the sheriff and not by the clerk. The irregularity is cured if the defendant allows the property to be sold without objecting.

Proceedings to sell property under an order of seizure and sale, after the seizure of the property, were not stayed by the mere commencement of proceedings in the United States District Court.

Sales made by virtue of "writs of seizure and sale" which were issued, and the seizure made prior to the enactment abolishing them and completed subsequently under the authority of courts to which they were transferred, are not null.

Chase vs. Gaslight Company, p. 800.

To stay the execution of an order of seizure and sale by a suspensive appeal, an appeal bond must be furnished, within the delays allowed by law, in a sum exceeding by one-half the sum for which the order of seizure and sale issued. An appeal bond in such a case is governed by Art. 575, C. P.

Where in such a case, an appeal bond has been furnished which is insufficient in amount under Art. 575, C. P., to sustain a suspensive appeal, and where the appellee moved in the lower court for a dismissal of said appeal on the ground of such insufficiency, and the judge of the lower court refuses to pass on the question under the erroneous belief that the matter is not before him, relief will be granted to the appellee on an application to this court for writs of certiorari and mandamus.

State ex rel. Feibleman vs. Judge, p. 1426.

EXEMPTION.

When a mechanic is employed to do a particular piece of work—for instance, to do the carpenter's work on a house, or to plaster, or to paint the same, and he works at his trade and employs others to assist him in the work, he is exempt from the license tax in pursuance of Art. 206 of the Constitution. City vs. Bayley, 35 An. 545; City vs. Lagman, 43 An. 1180.

But when he undertakes to build houses generally and only superintends the work and performs only such mechanical labor on them as his pleasure may dictate, or to show or direct those employed by him, he does not follow exclusively on the buildings, employing others to assist him, but he is contractor or master builder, employing others to do the work, exclusive of his labor. City vs. O'Neil et al., 43 An. 1182; City vs. Pothman, 45 An. —.

State vs. McNally, p. 44.

When a mechanic goes outside of his occupation and employs others in a different pursuit, such as brickmasons, painters and slaters, in the erection of buildings, his business is that of contractor and he is not exempted under Art. 206 of the Constitution from paying license tax. *City vs. Pohlman*, p. 219.

A building contractor is not exempted from license under Art. 206 of the Constitution, because, in connection with his business as contractor, he does some mechanical labor. Affirming City vs. Pohlman and City vs. McNally, 45 An. —.

City vs. Liebe, p. 346.

Shingles, laths, matched ceiling, dressed flooring, sidings, palings dressed and headed, fencing laths, mouldings, car sidings cut to lengths, dressed finished mouldings, casing moulding base boards, are articles of wood, ready for an immediate, convenient and general use, and exempt from taxation under Art. 207 of the Constitution.

Lumber Co. vs. Assessors et al., p. 454.

"Articles of wood," in Article 207 of the Constitution, refers to a particular substance or commodity manufactured from lumber, by hand, by art, or machinery, ready for immediate, convenient and general use, complete in themselves without further manipulation or work on them.

EXEMPTION—*Continued.*

Shingles, laths, cross-ties, dressed lumber, planed, tongued and grooved; weatherboards planed, dressed and ready for general use; mouldings, sashes, doors and blinds, boxes, pickets, turned stair work are such articles of wood, complete in themselves, ready for immediate, convenient and general use, without further manipulation or work on them.

"Articles of wood," such as planks, joists, sills, etc., which are intended for parts of a particular structure are not such articles as are intended for general, immediate and convenient use, each complete in itself. *Lumber Co. vs. Sheriff*, p. 456.

Shingles, laths, pickets, cross-ties, dressed flooring, moulded window casing, dressed and beveled weatherboarding, car roofing, car siding cut to length, are articles of wood ready for immediate and convenient use, and are exempt from taxation under Art. 207 of the Constitution.

Lumber Co. vs. Tax Collector, p. 459.

Capital invested to be habitually used and primarily intended to be used for a particular purpose not giving exemption from taxation can not become exempt by reason of its being occasionally, exceptionally and accidentally used for another.

Dry docks are not constructed for the purpose of building, but of repairing boats.

Exemption laws are strictly construed. *Robertson vs. City*, p. 617.

The products of a manufactory being a mere form into which the capital employed in business has temporarily passed, same are exempt from taxation as part of the capital employed in the manufacture. *Traction Co. vs. City*, p. 1475.

EXPROPRIATION.

Private property can not be taken unless for purposes of public utility. What constitutes public utility and public purposes is for the courts to determine.

Under Act 132 of 1890, expropriation suits may be tried in vacation.

Where the proceedings are not void on their face, and show no arbitrary action on the part of the respondent judge, the writ of certiorari will be refused.

Williams et al. vs. Judge, p. 1295.

FAMILY MEETING.

A family meeting when convoked has the right to select others than those named in the order, when the latter do not attend. They can select those who are not relatives, when no relatives are present.

If the proceedings and deliberations refer to the petition which prayed for the order and which was based on the averments therein and the deliberations are responsive, although briefly stated, to the objects for which the meeting was convoked, a purchaser of minor's property, ordered sold by said meeting, which was homologated, will be protected. A purchaser of minor's property, ordered sold by the advice of a family meeting, is not required to inquire into the personal qualifications of the members of the meeting. He has only to look to the regularity of the proceedings and the order homologating the same.

The sale of minor's property without the advice of a family meeting and order of court is null and void, and the purchaser is in bad faith.

Section 3 of Act 43 of 1882 is not in conflict with Articles 92 and 122 of the Constitution. The duties imposed upon the clerk in said section of said act are ministerial and mandatory.

Lemoine et al. vs. Ducoté et al., p. 857.

HUSBAND AND WIFE.

See Marriage.

INJUNCTION.

The petition shows that the act sought to be enjoined had already been committed. If so, it could not be corrected by injunction, as the purpose of an injunction, in the matter of the discharge of functions or the performance of duties in a public position, is to prevent and not to correct wrongs.

Callan vs. Commissioners, etc., p. 673.

It appearing upon the trial of a motion to dissolve an injunction obtained by a lessee against the lessor to prevent dispossession of leased premises that the latter had previously obtained a judgment evicting the lessee as contumacious, it will be dissolved.

To maintain an injunction under such state of facts, would be to perpetrate a fraud on the law.

Mengelle & Co. vs. Abadie, p. 676.

INJUNCTION—*Continued.*

A party holding an authentic deed of sale, perfect on its face, executed by the decedent, is not required to stand by and see the property sold at judicial sale as the property of the vendor's succession under an order of sale provoked by his administratrix which could only be sustained by proof that the sale was a pure simulation. He may rightfully enjoin such a sale.

Thompson & Co. vs. Herring, p. 991.

Injunction to restrain the execution of an order of seizure and sale by the debtor, only lies in cases prescribed by Art. 739, C. P.

The legal representative of the deceased debtor stands in the latter's shoes and has no other or greater rights than his.

Insufficiency of the authentic evidence on which the order issued is no ground for injunction; the remedy is by appeal.

Inability to furnish a suspensive appeal bond furnishes no title to relief by injunction.

Dupre vs. Anderson, p. 1184.

INSOLVENCY.

Where an order of court directing a forced surrender and under which the district judge has appointed a provisional syndic has been revoked by consent of the parties at whose instance it was rendered, the provisional syndic has no legal interest or standing in court to contest the action of the judge in revoking the order.

The order appointing him provisional syndic was not a judgment. It was a mere ancillary conservatory order which shared the fate and fell with that to which it was incidental.

A definitive syndic is in a sense the agent of the creditors, but a provisional syndic is at best an officer of the court. He has no vested right to his position entitling him to hold it until divested from the same by direct action.

State ex rel. Mauberret, Syndic, vs. Judge, p. 235.

A citizen of the State of Louisiana, having made a voluntary cession of his property, including real estate in Mississippi, and obtained the judge's order of acceptance for the benefit of his creditors; and, subsequently thereto, one of the creditors enumerated on his schedule, and domiciled in Louisiana, having instituted an attachment suit in a Mississippi court and caused the insolvent's

INSOLVENCY—*Continued.*

Mississippi property to be seized and advertised for sale under a judgment therein procured; and said creditor having thereafter transferred and assigned his judgment to citizens of the State of Mississippi, with full subrogation.

Held—That a court of the State of Louisiana has jurisdiction and authority over its citizens *in personam* to compel them to do justice; and the court of first instance to prevent the aforesaid creditor from defeating the operation and effect of the said assignment and thereby obtaining a preference over domestic creditors, notwithstanding his proceedings were directed against real property situated in Mississippi. Such creditor is within the territorial limits of the jurisdiction of the court and amenable to its process.

Equity acts *in personam* primarily, and when a person against whom relief is sought is within its jurisdiction, the court may make a decree upon the ground of an act, or contract, or an equity subsisting between the parties, respecting property situated beyond its jurisdiction, or to prevent anything being done abroad, whether the thing forbidden be a conveyance, or other act, *in pais*, or the institution or prosecution of an action in a foreign tribunal. And, as a necessary corollary of that power, such court may order the person violating the principles of equity to restore the proceeds and avails of the reprobated transaction as justice may require, and in accordance with the principles of the *lex loci rei sitæ*.

It is the accepted jurisprudence of the States of the Union that, in case of voluntary assignment, a surrender, if valid where made, is valid everywhere, unless repugnant to the policy of the *lex loci rei sitæ*, and in detriment to rights of domestic creditors within that jurisdiction; because such cession or assignment is the exercise of a personal right of the owner to dispose of his property as he chooses.

Hayden, Syndic, vs. Yale & Bowling, p. 362.

In a suit by the syndic of an insolvent estate to annul a mortgage granted three months before the judicial recognition and declaration of insolvency, it is essential to prove that the mortgage creditor, who, it is alleged, was preferred, had knowledge of the insolvent condition of the mortgagor.

INSOLVENCY—*Continued.*

Where a question of fact has been submitted to the lower court, the Supreme Court will not interfere with the judgment, unless a manifest injustice has been done.

Chapoton vs. Creditors, p. 451.

The insolvency of the partnership and that of the individual partner having by an order of court been consolidated in one case to be decided in one judgment, form but one suit.

The separate creditors having been compelled by the consolidation to prove their claims in these consolidated proceedings, have the right to vote for the discharge or against the discharge of the debtor.

The separate creditors of one of the partners have an interest in his estate in the partnership, for, if there is any balance of the estate of the partnership after payment of its debts, such balance must be divided and appropriated to and among the separate estates of the several partners according to their respective rights and interests therein, and the sum so appropriated to the separate estate of each partner must be applied to the payment of the separate debts. *Reilly & Co. vs. Creditors*, p. 470.

The facts disclosed by the record being, that a citizen of the State of Tennessee commenced suit in the United States Circuit Court in the State of Louisiana, against a citizen of the latter, and procured the seizure by executory process of certain mortgaged property; that certain other mortgaged creditors of same defendant, residing in Louisiana, intervened, setting up concurrent mortgage rights thereon; and that subsequently the seized mortgage debtor made a cession and surrender to his creditors generally, including the mortgaged premises among the assets surrendered. Held, that the continuation, by the intervening Louisiana creditors of the insolvent, of their claims for participation in the proceeds of sale in the custody of the Federal Court was not, in effect, a contempt of the stay-order of the State court having jurisdiction of the insolvency proceedings and estate.

Under such a state of facts the Louisiana creditors were without other alternative than the one they adopted, for had they not continued the prosecution of their demands in the court having possession of the *res*, and complete jurisdiction over it, they might have been altogether lost. *Calder & Co. vs. Their Creditors*, p. 739.

INSOLVENCY—*Continued.*

When the complaint is that the surviving member of a commercial partnership has, unauthorizedly, surrendered, along with his own interest in its assets, the interest of a deceased member of the firm, which had previously passed under a separate administration, held: It is the correct course to pursue for the alleged legal representative of the said decedent to institute a direct action against the syndic of the insolvent for the restitution of the property, and not for the revocation of the latter's letter of appointment and the judge's order of acceptance of his surrender.

Calder & Co. vs. Their Creditors, p. 765.

A party confined in jail under a decree of a competent court is not entitled to an absolute and immediate rele se from confinement upon making a surrender of his property and upon obtaining the judge's order of acceptance thereof. He must await the action of the meeting of his creditors.

Non constat that his cession and discharge may not be successfully opposed.

State ex rel. Cawley vs. Judge, p. 948.

The verdict of the jury in insolvency proceedings characterized the cession made as fraudulent.

The property of the insolvent did not thereby again become liable to seizure under execution or by attachment of individual creditors.

The interest of the mass of the creditors is not dependent upon the opinion of the majority in number and amount of the creditors, not legally expressed. The restraining order remains. Other proceedings must be taken and meeting of creditors held.

The surrender is made to the creditors, who have the right to sell the property for their benefit; that right can not be defeated by the fraudulent acts of the debtor.

Andrus vs. Creditors, p. 1067.

The creditors of an insolvent who has made a cession, which has been accepted, are vested with full power to administer and sell the property of the insolvent for the benefit of all the creditors. Their dominion over the property is supreme, and as all the property of the insolvent debtor, whether on the schedule

INSOLVENCY—*Continued.*

or not, passes from the debtor, subject only to reinvestment in him on paying the amount of his debts with the expenses attending the cession, they have the same power over that concealed and left off the schedule. The resident creditor, whether participating in the insolvent proceedings or not, is bound by the surrender and acceptance, and it may be stated as a general rule that no individual creditor can take any action in relation to the property surrendered to give him an advantage over the others. Whatever concealed property he may be instrumental in recovering inures to the benefit of all the creditors.

Where the insolvent has been found guilty of fraud, the effect of the conviction operates upon his person, depriving him of the benefits of the insolvent laws and subjecting him to punishment. It does not reinvest the property surrendered in the insolvent debtor.

Notwithstanding the order staying proceedings the creditors retain the privilege of protecting themselves in proper cases, not only by the arrest of their debtor but also for the seizure of his property not surrendered for the benefit of all the creditors.

Property recovered in an action *en déclaration de simulation* inures to the benefit of all creditors and all persons interested, as the property had never ceased to be the property of the debtor.

The estate of the insolvent must pay all expenses for the recovery of property which inures to the benefit of all the creditors.

McGraw et al. vs. Andrus, *p.* 1073.

An attachment by an individual creditor for his own benefit will not be maintained pending a cession.

After the property of an insolvent has been sold it can not be seized by an individual creditor by attachment, who alleges that the insolvent has been convicted of fraud, and that his property is situated as though no surrender had ever been made.

The conviction of the insolvent debtor of fraud does not have the effect of annulling the cession accepted by the creditors. The effect of the conviction operates only on the debtor, depriving him of the benefits of the insolvent laws and subjecting him to the penalty of imprisonment.

Gumbel & Co. vs. Andrus et al., *p.* 1081.

INSOLVENCY—*Continued.*

In case a party makes application for a respite in the court of one parish, and subsequently to same being granted he permanently changes his domicil to another parish, it is competent for a creditor, complaining of his failure to comply with the award, to proceed, by rule taken in the court of first instance, to compel him to make a surrender under the insolvent law. Act 134 of 1888 amending R. C. C. 3093 is ample warrant for thus proceeding.

State ex rel. Marks vs. Judge, *p.* 1349.

INSURANCE.

There was no necessity of remanding the case for the trial of issues presented and decided.

For the reason that reference was made to a special agreement *dehors* the policies of insurance, under which the defendants were bound to undertake the salvage of the wreck, the right to sue for damages for its violation was reserved.

Packet Co. vs. Underwriters et al., *p.* 1422.

INTERDICTION.

As much of the income of the estate of an interdicted person as may be needed to mitigate his sufferings and care for his person must be expended, and sufficient of whatever remains of the income applied to the support and comfort of his wife and children.

The wife without means is entitled to an amount for her support and the support of her children from the income of the estate, without the intervention of a family meeting.

Interdiction of Leech, *p.* 194.

INTEREST.

Where the plaintiff in an hypothecary action against a third possessor of mortgaged property declares (as his instrument of attack) upon a judgment which by its terms decrees no interest, the blow inflicted is gauged by and corresponds with the weapon used. A judgment of the character mentioned does not carry with it, as such, interest against the third possessor. If interest could under any circumstances be claimed by the holder of such a judgment, it would arise, not from the judgment itself *proprio vigore*, but from extrinsic facts.

Smith vs. Lewis, *p.* 1457.

JUDGMENT.

Where the judge of the lower court fails to pass upon the issue actually before him, and passes upon one not raised by the pleadings and evidence, the judgment will be annulled and the case will be remanded.

Kuhnholz vs. City, p. 1398.

JURISDICTION.

Although this court alone is vested with general supervisory jurisdiction over inferior courts, every appellate court has power to issue writs of mandamus, prohibition and certiorari in aid of its appellate jurisdiction.

When a city court has refused a suspensive appeal applied for in a case appealable to the Civil District Court, the latter court is clothed with jurisdiction and power to issue writs of prohibition, mandamus and certiorari addressed to the former and to determine thereon whether or not it was the duty of the inferior court to grant the suspensive appeal, and, if finding that such was its duty, to enforce the performance.

In such a proceeding the judgment of the District Court is not appealable to this court, and, if the proceedings are regular, it is not subject to our control in the exercise of our supervisory jurisdiction under the rules which we have adopted and uniformly adhered to, and under which this court only examines questions affecting the validity of judgments and proceedings, and does not assume to correct mere errors.

State ex rel. Rocchi vs. Judge, p. 532.

The original jurisdiction of inferior courts must be construed with reference to Art. 11 of the Constitution, which ordains adequate remedy in the courts for all legal rights.

The plaintiff in this action, the importance of the issues involved, and the character of the suit are within the jurisdiction of this court.

State ex rel. Custodian Notarial Records vs. Theard, p. 680.

A writ of *fieri facias* having issued to enforce the payment of alimony for one month, under an order of the District Court that plaintiff should pay defendant forty-five dollars per month, a rule was taken by plaintiff on defendant to show cause why the same should not be set aside. After hearing had the rule was

JURISDICTION—*Continued.*

made absolute and the writ set aside. The defendant appealed. *Held*, that the matter in dispute was below the appellate jurisdiction of the Supreme Court. *Imhof vs. Imhof*, p. 706.

A debt due by a New York debtor to a Kentucky creditor does not acquire a *situs* in this State because the non-negotiable evidence of the debt is found here.

A Louisiana court has no valid authority to appoint an administrator to a person who was domiciled and died in Kentucky, and who left no property in this State.

Moise, Tutor, vs. Life Association, p. 736.

Where a defendant against whom a judgment has been rendered in the District Court for an amount within the appellate jurisdiction of the Court of Appeals takes an appeal from the judgment returnable to the latter court, and the appellee moves in that court to dismiss the appeal on the ground that the allegations of the petition show a "matter in dispute" within the jurisdiction of the Supreme Court, the Court of Appeals has, for the purposes of a decision on the motion, the right to examine the nature of the cause of action, the pleadings as a whole, and the evidence and course of proceedings in the lower court, and is not restricted to the prayer of the petition.

When from such an examination, reaching the conclusion that allegations were inserted in the petition solely as a pretext to have recourse to the Supreme Court where the true matter in dispute is below its constitutional jurisdiction, and within its own, it overrules the motion to dismiss and retains jurisdiction, its action will be sustained on application for writs of prohibition and certiorari where the record shows that had the appeal been brought to the Supreme Court it would have been dismissed *ex proprio motu* for want of jurisdiction.

State ex rel. Abraham vs. Judges, p. 883.

Plaintiff's judgment is for an amount *less* than two thousand dollars.

The judgment prayed for, to rescind and annul the conveyance of their debtor, was revocatory and not *en déclaration de simulation*.

In a revocatory action the test of jurisdiction is the amount claimed by the creditor, and not the value of the property, the sale of which the plaintiffs seek to have revoked.

Moore, McKinney & Co. vs. Ringuet, p. 1115.

JURISDICTION—*Continued.*

The Court of Appeals, in aid of its appellate jurisdiction, has the exclusive power to issue a writ of prohibition to the District Court, which is proceeding to try a case on the docket of the Court of Appeals, and of which its jurisdiction has not been divested.

On the relator failing to get relief in that court it will be timely to invoke the supervisory jurisdiction of this court.

State ex rel. Kirsch vs. Judge, p. 1206.

Notwithstanding the affairs of the Consolidated Association of Planters of Louisiana are in process of liquidation in a Federal court, a court of this State is quite competent to entertain, and, on sufficient proof, make absolute a rule taken for the cancellation of a mortgage resting on property against which another special mortgagee is proceeding by seizure and sale on a competing mortgage. *Peuch et al. vs. Daret*, p. 1281.

A mandamus proceeding to compel the erasure of tax inscriptions from the mortgage records on the ground that same were improperly assessed involves the tax and not the property; and in case the amount of the taxes is less than $2000 this court has no jurisdiction *ratione materiæ*. *DeBlois et al. vs. City*, p. 1308.

The Court of Appeals has no jurisdiction of a demand for alimony, as it is an accessory to the principal demand in a suit for divorce or separation from bed and board, of which it has no jurisdiction. Arts. 81, 95, Const.

An inferior court having an application in aid of its appellate jurisdiction for writs of mandamus and prohibition passed upon its jurisdiction, correctly, this court will not do a vain and idle act, in compelling said court by the exercise of its supervisory jurisdiction to pass a second time on said question of jurisdiction.

State ex rel. Suberville vs. Judges, p. 1319.

Where a bail bond is forfeited under Section 1032, R. S., and an appeal is taken from the forfeiture to this court, it is settled that this court has jurisdiction regardless of the amount of the bail bond, if the same was given in a criminal prosecution within the jurisdictional power of this court; the doctrine being that in such a case the matter of the forfeiture is attracted to the criminal prosecution.

JURISDICTION—*Continued.*

But the doctrine does not apply to a bail bond given before a recorder of the parish of Orleans for appearance at a preliminary examination before him; such a bail bond not being within the purview of Section 1032, R. S., which applies to the forfeiture of bail bonds for appearances before District Courts having criminal jurisdiction.

A bail bond for the appearance of an accused at a preliminary examination before a recorder of the parish of Orleans creates a lawful and binding obligation and such a bail bond may be sued upon by a civil action in the Civil District Court for the parish of Orleans. But where the amount of such a bail bond is only $500, this court has no jurisdiction on appeal.

Society vs. Cage, *p.* 1894.

JUSTICES OF THE PEACE.

The Constitution defines the jurisdiction of justices of the peace and confines it to action as committing magistrates, having power to bail and discharge in certain cases.

Justices of the peace have no jurisdiction to enforce penalties of fine and imprisonment imposed for violation of parochial ordinances by criminal proceedings inaugurated by ordinary civil process and citation.

An ordinance conferring such jurisdiction on justices of the peace is illegal and unconstitutional, and proceedings in exercise thereof are null and void.

Parish vs. Block, *p.* 1090.

LAWS.

When a question arises in a court of law as to the existence of a statute, or as to the time when a statute took effect, or as to the precise terms of a statute, the judge who is called upon to decide it has the right to resort to any source of information which, in its nature, is capable of conveying to the judicial mind a clear and satisfactory answer to the question.

When the Constitution does not require legislative journals to affirmatively show that a particular thing necessary to legislative action was done, mere silence will not invalidate; and, in such case, it will be presumed that the Legislature observed their obligation, and did not pass the bill without sufficient proof of proper proceedings having been taken.

LAWS—*Continued*.

The unconstitutionality of an act duly enrolled, authenticated by the signatures of the presiding officers, and approved and signed by the Governor, must be affirmatively and clearly shown before a court of justice is authorized to treat it as void on account of same not having been passed in accordance with the rules of parliamentary law prescribed in the Constitution.

From considerations of public policy, and because of the respect due the action of a co-ordinate department of government, courts will supply apparent omissions from legislative journals by presumptions as to the regularity of the proceedings of the General Assembly; and it is a rule that has been found most salutary.

Hollingsworth vs. Tax Collector, p. 222.

The remedy invoked by relator embodied in Section 352 of the Revised Statutes, which, having reference to official bonds, declares that "for the acceptance of the sureties offered upon the bond the assent shall be unanimous, and on refusal to accept any surety the district or parish judge shall have the power upon application in vacation, as well as in term time, to compel them to show cause why they do not accept such surety; and in all such cases the parties whose duty it is to judge of the sureties offered shall, on demand of the party complaining, certify to the judge their decision and the evidence on which it was based, whose duty it shall be to decide immediately thereon, and from his decision in the case there shall be no appeal," though styled in the proceedings a "mandamus," is not strictly such; it is a special statutory remedy expressly authorizing the district judge to review the action of certain officials in respect to a particular matter, and on due and legal cause not having, in his opinion, been shown to justify the same, to reverse that action, to pronounce in the case the decision which those officers should have made and to order them to do that which they should have done originally.

The contention that so much of the section as refuses an appeal is unconstitutional in that it is in conflict with Article 81 of the Constitution which guarantees an appeal in all cases where the matter in dispute is over two thousand dollars, exclusive of interest, is not well founded. Defendant has no pecuniary interest in the litigation and maintains his right of appeal only as a

LAWS—*Continued.*

representative of the State and parish. As such he has just such rights and is charged with just such duties as are imposed upon him by the particular statute under which he is acting. The clause objected to, so far as the State and parish are concerned, is not a limitation upon or a denial of the constitutional right of appeal, but the designation of a particular class of cases as to which the Legislature has declared that for the purpose of enabling officers to qualify as such, it is not deemed necessary for the safeguarding of the interests of the State and parish to pursue an investigation as to the sufficiency of the sureties on the bonds tendered by them beyond the action of the district judge. Act No. —, of 1878, authorizing the Governor to direct the institution of suits subsequent to the induction of officers to test the sufficiency of their bonds, guarantees the State and parish against any original mistake in approving and accepting them.

Defendant but for Sec. 352 of the Revised Statutes would have been entitled to appeal. He had the legal right to raise an issue in the lower court as to whether or not that section had been repealed, and whether by such repeal his conclusions as to the solvency of the bonds tendered to him for acceptance were not final and free from revision by the district judge, particularly (as he claimed) under a writ of mandamus, and the lower court having ruled adversely to him, an appeal lies for the determination of those restricted issues.

Section 352 of the Revised Statutes has not been repealed, and under its terms no appeal lies from the decision of the judge upon the merits of the rule.

The various statutes of the State between the adoption of the Revised Statutes and that of the Constitution of 1879 did not expressly repeal Section 352, and there are no provisions in any of them inconsistent with it—they could all be read together harmoniously as a single act. There is nothing in the section inconsistent with the Constitution of 1879, and under Article 258 of that instrument it remained unimpaired by its adoption.

The terms of Article 118 of the Constitution relative to a subsequent enactment by the general law on the subject of sheriff's bonds are not to be enlarged by construction to reach a result obviously not within its intendment. Its adoption was due to the merging by the Constitution of the two offices of sheriff and tax

LAWS—*Continued.*

collector, and to the making certain that legislation should be adopted to meet the change thus operated. It did not carry with it a peremptory command to the General Assembly to legislate *de novo* upon a matter already provided for and needing no alteration to conform to new conditions, and that body has not construed it to be its duty so to do. Until it shall have done so, matters must be governed by existing laws.

The construction contended for would require the court to declare a general law repealed by a special statute on a particular subject by mere implication, and by such implication not only to reach the result aimed at, and declared by Article 118 of "fully securing the State, the parish and all parties in interest," but of breaking down salutary checks and balances now existing, productive of and attaining that very end.

State ex rel. Bourgeois vs. Police Jury, p. 249.

LEASE.

Under Act 96 of 1888, where a party has been cited to deliver up leased premises and he appears and pleads a general denial, and judgment is rendered against him, it is too late to urge matters for the writ of prohibition that ought to have been pleaded in the court below.

State ex rel. Duthoo vs. Judge, p. 213.

Overflows in the past history of this State have been of frequent occurrence, and they are therefore not of such "extraordinary nature that could not have been foreseen."

The destruction of the crops by them is not a sufficient cause for the abatement of the rent, but they are unavoidable accidents, within the meaning of Art. 2719, Civil Code, and relieve the tenant from repairing damages caused directly by them.

In a suit for damages the plaintiff must prove his damages with legal certainty.

Where the testimony is conflicting we will not disturb the judgment of the lower court without a manifest injustice has been done.

Before a party can resort to prove what disposition was made of property seized, he must first show that it was legally sold under an order of court, by agreement of the parties, or under a *fi. fa.*, and the loss or destruction of the authority under which it was disposed of. *Payne vs. James & Trager*, p. 381.

LEASE—*Continued.*

Unless the lessor timely claims damages suffered under the first lease, after a second has been made, with the same lessee, there is acquiescence, which precludes a claim for damages.

The purchaser is presumed to buy the accessory rights to the property transferred, but damages suffered by the vendor, before the sale, are a personal right not transferred, and can not be recovered without an express subrogation.

The purchaser acquires rights to rent from date of sale, and does not take prior rents due. *Mathews vs. Alsworth*, *p.* 465.

As against a third possessor, a seizure under a mortgage against the owner taking place during the pendency of a plantation lease for the entire year, payable in kind out of the crops when gathered, only covers the proportion of rents due for the unexpired term after its date.

The transferee of a lease made by the owner prior to seizure has all the rights of a third possessor, so far as rents under the lease are concerned.

Other questions decided on grounds of fact.

Thompson vs. Ratcliff, *p.* 474.

The lessors' rights are not affected.

The lessees of plaintiffs organized a corporation, limited.

They transferred their stock in trade and their business establishment, on the premises leased, to the company, limited.

Upon the change from a partnership to a corporation, of which the partners were the owners of seven-eighths of the shares, they gave no notice to their lessors.

It is not proven that the lessors knew that the corporation was the sub-tenant.

The corporation is not entitled to the rights of sub-tenants.

They were third persons and their goods were covered by the lessors' privilege.

The corporation, while occupying the property leased, alleging their financial embarrassment, applied to liquidate its affairs.

Liquidators were appointed and an order was granted by the court authorizing liquidation.

Immediately after, plaintiffs obtained a writ of provisional seizure. The corporation intervened.

LEASE—*Continued.*

The provisional seizure legally issued and is maintained.

Plaintiffs were not bound to intervene in the liquidation proceedings, to prevent the removal of the goods and to assert their rights as lessors.

Before defendants had answered plaintiffs' suit the corporation discontinued its liquidation proceedings and resumed business under its charter.

The corporation, as intervenors in plaintiffs' suit and provisional seizure, furnished a forthcoming bond to the sheriff, and received possession of the goods from that officer.

The bond represents the goods.

The judgment is amended by allowing execution for the amount due at the time, will issue, and for the balance payable from month to month, in accordance with the terms of the lease.

The fee of attorney stipulated in the contract of lease is due, also interest as allowed in the judgment of the lower court on the amount actually due and unpaid.

Henderson et al. vs. Myer & Bro., p. 791.

The possessor of real estate under an unrecorded lease is thereunder invested with no right whatsoever as against a seizing attachment creditor.

Flower & King vs. Pearce & Son, p. 853.

A lessee, in possession of a newspaper plant and paraphernalia thereto appertaining, can not convert himself into an owner thereof without the knowledge or consent of his lessor and by the unique and simple process of changing his name and capacity from editor and publisher to editor and proprietor.

Reid et al. vs. Mayo et als., p. 1091.

In summary process to obtain possession of leased premises the defendant must comply with Sec. 2157, in order to obtain a suspensive appeal.

Where the cause of action is not within the jurisdiction granted by law to the tribunal, it can dismiss the suit at any time it is brought to its notice.

State ex rel. Lamouraine vs. Judge, p. 1316.

LEVEE DISTRICTS.

The legislative act creating the Bossier Levee District made no provision for a new, separate, or additional *assessment* of property within the district, the only duty in this regard that it cast upon the levee commissioners being to levy the taxes contemplated thereunder. They were not empowered to make any new valuation or appraisement; nor is the parish assessor authorized or required to make a new assessment. The board of reviewers were not entrusted with the performance of any duty in respect to such tax. The only question of doubt or uncertainty that could arise under the operation of this statute is one of *fact*—namely, whether the land on which the levy of taxes is made was or not *alluvial*, and consequently subject to the tax *vel non:* and it does not involve a question of constitutionality of the law.

Hollingsworth vs. Tax Collector, p. 222.

Repeated decisions have settled the law of Louisiana to the following effect: that under Art. 665 of the Civil Code, riparian property on navigable rivers is subject to a servitude or easement imposed by law for the public utility, authorizing the State, under proper laws, to appropriate the space required for the making of levees and roads; that, in locating and building levees, the State does not expropriate property, but lawfully appropriates it to a use to which it is subject under the title itself; that in so doing she acts, not under the power of eminent domain, but in the exercise of her police power; that laws, constitutional or statutory, concerning expropriation of property and requiring compensation therefor, have no application to property legitimately taken for levee purposes; and that private injury resulting therefrom is *damnum absque injuria.*

The statute constituting the defendant levee district expressly dedicates all its funds exclusively to drainage and levee construction; authorizes it to construct only such levees as are approved by the State Board of Engineers, devolves on the State Engineers the exclusive authority and duty to locate levees, and charges them with all the responsibility for such location.

The defendant commissioners, having built its levee on the line located by the State Engineers, have only performed the plain duty imposed on them by law, and can not be held in damages by a citizen claiming to be injured thereby. If there has been

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The defendant commissioners, having built its levee on the line located by the State Engineers, have only performed the plain duty imposed on them by law, and can not be held in damages by a citizen claiming to be injured thereby. If there has been

LEVEE DISTRICTS—*Continued.*

fault it was committed by the State Engineers. The corporate funds could, in no event, be diverted from the public purposes to which they are exclusively dedicated by law. The commissioners, if desirous to do so, could not appropriate them to payment of such damages without violating the law, and judicial power can not be invoked to compel them to violate the law.

The law being valid, no acts of officers within the authority conferred can give rise to any legal damage; and if they have acted without and beyond such authority, their acts are not binding on their principal which is a mere functionary of the State, and any liability incurred must be personal.

Whatever remedy the plaintiff may have had to prevent unlawful action by these officers it can not take the shape of an action for damages against this corporation, which is the only question here involved. *Peart vs. Levee District*, p. 421.

LEVEES.

See Levee District.

The State having located a public levee and awarded to a contractor the work of constructing it, the fact that third persons have bound themselves to the contractor to supplement the contract price by subscriptions of money does not impair the public character of the work.

Act 74 of 1892 creating the Caddo Levee District does not impair the power of the Governor, under Act 33 of 1879, to contract for public levees in said district to be paid for with moneys in the general engineer fund.

The Board of State Engineers has the power to close Bayou Pierre by a dam, which is part of the public levee system of the State. The upper part of Bayou Pierre is not navigable; besides, that stream is wholly within the State and the authority of the Legislature over it is complete.

The act of Congress admitting Louisiana into the Union does not forbid the Legislature from closing by a dam such a stream as Bayou Pierre.

The State, in locating its public levees, acts in the exercise of its police powers, and private injury resulting therefrom is *damnum absque injuria.*

Eagan & Husband vs. Hart et al., p. 1360.

LIBEL.

Under the law of Louisiana libel is a *quasi* offence, actionable under the broad provision of the code, "Every act whatever of man that causes damage to another obliges him by whose fault it happens to repair it." Spotorno vs. Fourichon, 40 An. 424.

Our courts are not bound by the technical distinctions of the common law as to words actionable *per se* and not actionable *per se*. Miller vs. Holstein, 16 La. 389; Feraz vs. Foote, 12 An. 894; Spotorno vs. Fourichon, 40 An. 424.

The extent of damage to credit is an inferential fact arrived at only by an examination of all the circumstances in a case, and can not be the subject of direct proof. Damages or injury may be inferred from the nature of the words written, and from the circumstances under which they were written without the necessity of special proof. Miller vs. Holstein, 16 La. 389; Daley vs. Van Benthuysen, 3 An. 69; Tresca vs. Maddock, 11 An. 206; Cass vs. N. O. Times, 27 An. 214; Spotorno vs. Fourichon, 40 An. 424. *Warner vs. Clark & Co.*, *p.* 863.

Plaintiff, in an action for damages for a libel, has the right to specifically affirm in his pleadings, and on a trial, to prove the nonexistence of the conditions upon which would be dependent a right of exemption from liability, grounded on the fact that the matters complained of were charged in a judicial proceeding; he can not be cut off from establishing his allegations to that effect by an exception of no cause of action.

The fact that matter defamatory and libelous in its character was charged in the petition of a plaintiff against a defendant does not of itself carry absolute exemption from liability for damages claimed by reason of said defamatory and libelous charges. Other facts must concur to bring about that result.

There is a great difference between an absolute exemption from liability for damages for acts done in the course of judicial proceedings under a given state of facts proven, and an absolute exemption from liability to a suit for the purpose of testing whether such a state of facts exists as would convey with it such protection from damages, and between the situation of parties at the end of a lawsuit after evidence adduced and that of parties at its beginning standing on pleadings.

Randall vs Hamilton, *p.* 1184.

LIQUIDATORS.

See Receivers.

MALICIOUS PROSECUTION.

In the absence of satisfactory and clear proof of malice and want of probable cause for the prosecution, no recovery can be had for indemnity—both being the essential ingredients of a malicious prosecution.

Courts of justice will not inflict damages on a party who, in good faith, resorts to the law for the protection of his legal rights rather than have recourse to arms.

Garnier vs. Bernard, p. 1265.

MANDAMUS.

Mandamus will not issue to compel a justice of the peace to dispose of a prosecution for violation of a parochial police ordinance by fine or acquittal where the justice has disposed of the matter by commitment to the District Court.

Board of Health vs. Nunez, p. 205.

The adjudicatee of a contract for the collection of delinquent taxes and licenses of the city of New Orleans, for a specified year, is required to obtain and have prepared by the city notary a notarial contract therefor, conformably to the specifications of an ordinance adopted by the City Council in pursuance of a State law. *Held*, that failing to obtain such a contract for presentation to the mayor for his signature he is without legal right to compel him, by mandamus, to sign any other.

The writ of mandamus never creates any new authority, nor does it confer a power which did not exist before. It does not make duties, but lies to compel a party to do what was his duty without the writ. This writ will not lie unless the act desired is of absolute obligation on the part of the person to be coerced. The relator must show not only a clear legal right to have the thing done, but also by the person sought to be coerced, in the manner sought, and that he still has it in his power to perform the duty required. The action must not only be in respondent's power to do, but it must be his duty to do it.

State ex rel. Comerford vs. Mayor, p. 269.

MANDAMUS—*Continued.*

Although this court alone is vested with general supervisory jurisdiction over inferior courts, every appellate court has power to issue writs of mandamus, prohibition and certiorari in aid of its appellate jurisdiction.

When a city court has refused a suspensive appeal applied for in a case appealable to the Civil District Court, the latter court is clothed with jurisdiction and power to issue writs of prohibition, mandamus and certiorari addressed to the former and to determine thereon whether or not it was the duty of the inferior court to grant the suspensive appeal, and, if finding that such was its duty, to enforce the performance.

In such a proceeding the judgment of the District Court is not appealable to this court, and, if the proceedings are regular, it is not subject to our control in the exercise of our supervisory jurisdiction under the rules which we have adopted and uniformly adhered to, and under which this court only examines questions affecting the *validity* of judgments and proceedings, and does not assume to correct mere *errors*.

State ex rel. Rocchi vs. Judge, *p.* 532.

The trial judge will not be ordered to sign a bill of exception which contains a statement that witnesses for the defence testified exonerating the accused, the judge averring in his return to the writ of mandamus that the statement does not comport with the facts proven on the trial, and that he is willing to sign a proper bill.

State ex rel. Jones vs. Judge, *p.* 1218.

MANDATE.

Where an agent is authorized to sell and dispose of certain lands, and he exchanges them for other lands, the principal ratifies the act if he sells the lands which his agent received in exchange.

A copy of a copy of an authentic act is inadmissible in evidence, unless the original is alleged and proven to be lost and that a copy thereof can not be obtained.

Chambers vs. Haney, *p.* 447.

The items which figures on the credit side of an account furnished by an agent at the instance of the heirs of his principal are not barred by the prescription of either three or five years.

MANDATE—*Continued.*

Where a principal in a written instrument dated in 1884 acknowledging himself to be then indebted to his agent for his services authorizes him to pay the debt and interest from the net profits of a plantation of which he continues him the management and the possession, the heirs of the principal can not successfully plead against such claim either the prescription of three or five years, when at their instance and being still in possession he renders them an account and net profits to cover his claims are not shown.

Beattie et al. vs. Hawkins et al., p. 512.

The principal's act will be liberally construed in favor of a ratification.

A principal notified of the acts of his agent must disapprove them, within a reasonable time, or he will, by his silence, ratify them.

A judgment carried on a final tableau of distribution and partly paid in the final settlement of a succession, and duly homologated after notification, binds the heirs, who will not be heard to plead its nullity on the ground of defective citation served upon their ancestor, the judgment debtor.

The authority of an agent can not be contested, more than twenty years having elapsed since the agency was alleged and the judgment obtained.

More than ten years have elapsed since the property was purchased by plaintiff's author in good faith, and a title acquired which was legal and sufficient to transfer the property.

Johnson vs. Carrere, p. 847.

Whatever an agent does within the scope of his authority is, in legal effect, the act of the principal, who is entitled to its advantages and is also subject to its liabilities.

Destrehan vs. Lumber Co., p. 920.

MARRIAGE.

The husband, as head of the community, and not the wife, is responsible for rent of property occupied by him and his wife, who is an heir and has an interest in the property.

Succession of Dumestre, p. 200.

MARRIAGE—*Continued.*

When a divorce *a vinculo matrimonii* is sought by one of the parties to a marriage that was celebrated in this State conformably to its laws, against the other party who is an absentee, permanently residing beyond the territorial limits thereof, a court of this State has ample jurisdiction and authority to decide the issue, it involving a civil status; and that jurisdiction attracts to it authority to bring such absentee into court by means of substituted service of citation and subject him to the judgment therein pronounced. *Butler vs. Washington*, *p.* 279.

A notarial act executed by the wife, in which she sells her paraphernal property, is null and void as against her, if the same was executed under the coercive influence of the husband.

The wife is a competent witness as to the threats which induced her to sign said act. She is not confined in her attacks on said act to counter letters, interrogatories on facts and articles, but may resort to competent parol testimony to show the real character of the transaction.

The fact that no threats were heard by the notary, and that the wife was cool and self-possessed when she signed the act, and the testimony of relatives and neighbors that she made no complaint to them is negative in its character, and does not absolutely contradict the wife's positive testimony as to the threats made by the husband.

The threats once made are presumed to influence the wife and cause her silence until an opportunity is presented for the assertion of her right on the property alienated.

The silence of the wife does not estop her. She is not bound by the doctrine of estoppel as usually understood.

In the sale of the wife's property under alleged threats, the fact that she received no benefit from the sale will corroborate to a certain extent her evidence as to the threats.

The wife may introduce parol testimony to show that the person who eventually acquired her property was in fact the original party for whose benefit the sale was made and is not an innocent third party who acted upon the apparent validity of the transaction.

Where a party is interposed and a simulated sale is made to him by the wife of her property, and it is then immediately sold to the husband, it is a sale direct from wife to husband, and therefore null and void.

MARRIAGE—*Continued.*

A party who has a judgment in his favor can not obtain a new trial for the purpose of introducing corroborative evidence.

Vicknair, Wife of Lasseigne vs. Trosclair, p. 373.

The facts being established: (1) That, at the date of the marriage between plaintiff and defendant, the latter was already lawfully married to another; and (2) that plaintiff was fully cognizant of that fact, the legal conclusions follow: (1) That plaintiff is entitled to the decree prayed for by her in this suit, declaring the nullity of the marriage; and (2) that the marriage produced no civil effects either as to the parties or their offspring.

A judgment rejecting plaintiff's demand of nullity, and granting a decree of nullity in favor of the husband on his reconventional demand, must be reversed and rendered in favor of the plaintiff.

Monier vs. Contejean, p. 419.

A crop hanging by the roots when the usufruct is opened belongs to the usufructuary.

If the surviving partner in community does not choose to exercise her rights as usufructuary, but qualifies as administratrix of the estate of her husband and administers the affairs of the community, for whose account the fruits hanging by the roots are gathered and sold in the market, and the proceeds applied to the payment of the debts (leaving a balance due the community by the administratrix, which is placed to the credit of the community on her final account duly homologated), the syndic of her estate has no authority collaterally to attack the judgment of homologation, and recover funds as belonging to the usufructuary disposed of by her prior to her insolvency.

The survivor in community, transferee, is subrogated to the mortgagee's rights and entitled to the balance after its deduction upon settlement of accounts.

Caire vs. Creditors, p. 461.

Domicil is acquired by the combination of residence and the intention to reside in a certain locality.

If the intention of permanently residing in a place exists, a residence in pursuance of that intention, however short, will establish a domicil.

MARRIAGE—*Continued.*

If the wife wilfully and maliciously decline to accompany her husband to a new home without any just or reasonable cause, it is an act of desertion on her part.

If, on the other hand, the husband leaves his home and his wife and children, and goes elsewhere, abandons them without making the least attempt to aid in enabling them to join him, he may be summoned to answer to an action based on abandonment of the wife by the husband. *McLean vs. Janin, p.* 664.

If a husband actually hold and possess as owner property at the date of the second marriage, the fact that he may hold it unduly does not preclude him as between himself and his second wife from claiming it as his own. The origin and source of the property does not concern her; it is enough that it does not belong to her and the second community. *Imhoff vs. Imhoff, p.* 706.

When the husband administers the movable paraphernal property of the wife, and sells it to one who purchases in good faith, the latter will be protected from the claims of the wife on said property. She must look to her husband for reimbursement.
McGuirk vs. Marchand, p. 732.

The purchaser of dotal property legally alienated has nothing to do with the reinvestment of its value. The husband alone has the administration of the dowry. All that the purchaser has to do is to pay the price to the husband, who may act alone for the preservation of the dowry. The proceeds of the sale stand in lieu of the property itself, and become dotal. If the husband fails to reinvest the dotal funds the wife will have a legal mortgage on his immovables and a privilege on his movables for their restitution.

A marriage contract executed abroad by persons who have a domicil in the place where it is executed, the part of the contract relating to the sale of immovable property in Louisiana must be construed according to the laws of Louisiana.
Heine vs. Insurance Co., p. 770.

The court maintains the rules laid down in Miller vs. Handy, 33 An. 160, as regulating purchases on credit by a wife in community; but when a wife has so purchased and has actually paid, out of

MARRIAGE—*Continued.*

her own funds, two-thirds of the purchase price, besides all interest, taxes and expenses, and has held and administered the property in her own right for more than sixteen years, and for six of them after the death of her husband; when her husband went into bankruptcy and omitted this property from his schedule without complaint from any creditor; when the inventory of his succession omitted it without any such complaint; when the wife has died without any attack on her title, we consider that the laches and the long acquiescence of the husband's creditors till after her death would relax the rigidity of proof ordinarily required in such cases, and that the evidence in this case would, under such circumstances, suffice to defeat an attack by them, which, however, has never been made or threatened, and is only suggested by an adjudicatee as an objection to accepting the title.

In this case the heirs of the husband are also sole heirs of the wife and are interested in maintaining the latter's title.

There would be no motive for attack by creditors in any event, because the unpaid price and restitution of wife's paraphernal funds would about absorb the value of the property.

Succession of Lewis, *p.* 833.

Without alleging some mutuality or privity of obligation as mandatories, husband and wife can not be proceeded against as joint or solidary obligors on that account.

Carreau vs. Chapotel, *p.* 850.

The question is not one of constructive service *vel non*, but whether the wife, who is out of the State, can be brought into court to respond in a civil suit by citation on her husband, an absentee who happens to be temporarily in this State.

The service, in so far as she is concerned, being personal, the court was without jurisdiction.

The husband who joins and aids his wife in committing a tort in an illegal sequestration proceeding instituted to recover her paraphernal claim is bound *in solido* for the damages occasioned.

Crow et al. vs. Sheriff et al., *p.* 1221.

When a husband appeals from a judgment rendered against him in favor of his wife for a separation from bed and board, and for $1600 for paraphernal funds belonging to her, converted to his

MARRIAGE—*Continued.*

own use, the wife is not entitled to have the appeal dismissed *quoad* the moneyed judgment as being below the constitutional jurisdiction of the Supreme Court.

A separation from bed and board carries with it a separation of property. A moneyed demand accompanying an action for such separation is an incident of the main action, and becomes inseparably connected with it as so brought.

Repeated acts of drunkenness, followed by occasional spells of sobriety and moderate drinking, with the habit of drinking so fixed that temptation to drink can not be resisted, will constitute habitual drunkenness within the meaning of Art. 128 of the Civil Code. And if it is of such nature as to render the living together of the spouses insupportable, the complaining party is entitled to a decree of separation from bed and board.

Notes given by the husband to the wife for her paraphernal funds used by him are admissible to prove the indebtedness of the husband to the wife.

The husband is bound to support the marriage charges, and the wife can only be called to contribute one-half of the income of her paraphernal effects, of which she retains the administration.

DeLesdernier vs. DeLesdernier, p. 1364.

Where a man keeps house with a woman whom he calls his wife, introduces her into the community in which he lives as his wife, receives friends and relatives at his house as a married man and he and his wife visit them as man and wife, and he is generally known and respected as a married man and has children who are christened as the offspring of this cohabitation, taking his name and reasonably looked upon as legitimate children, this cohabitation and relationship is presumptive evidence of marriage when there are no facts and no general or partial reputation in the community to show that the cohabitation is illicit. The abandonment of the reputed wife by the husband when such relationship exists is not proof of illicit cohabitation. His declarations that the children are illegitimate, made after the abandonment, and his last will, in which he ignores the reputed marriage, are not sufficient proof to rebut the presumption of marriage resulting from the oral testimony establishing such presumption. *Bothick vs. Bothick et al.*, p. 1382.

MARRIAGE CONTRACTS.

Where the notary before whom a marriage contract is alleged to have been executed, and which contract is averred to have been destroyed by fire, deposes that he remembers perfectly the act and its execution—that it declared that the parties thereto were about to be married, and that in view of the contemplated marriage had agreed that there should be no community between them; that the act was passed by him, duly signed by the parties and duly witnessed and recorded, proof of the fact that the parties were not married when the act was passed rests upon the recitals of the act of which the notary testifies he has a distinct recollection. These recitals bind both the parties and their heirs to their verity. The force of this testimony is not weakened because at another point in his testimony he stated that he knew the parties were not then married, because they came together to his office before the act was passed and told him they were about to be married, and the character of the act they desired passed. This fact, together with others specified, were simply explanatory of the vivid recollection of the witness of this particular act.

If a marriage contract be proved to have been executed before the celebration of the marriage, the precise day of its execution is immaterial Time is of the essence of the contract only with reference to its being prior to the marriage.

In the contest between the heirs of a wife and those of a husband, where the plaintiffs and defendants are all children of the same mother, though by different husbands, the issue being whether or not the second marriage was contracted under a marriage contract, the declarations of the wife during the second marriage that such was the fact are admissible in corroboration of the testimony of the notary before whom the contract is alleged to have been passed, to the effect that such a contract was executed before him. A proper foundation for the introduction of secondary evidence, as in the case of a destroyed instrument, having been laid, the testimony of the notary and the declarations of the wife were both admissible.

The husband of one of the heirs of a succession can testify for or against a co-heir touching the latter's interest in the succession. Boisse vs. Dickson, 31 An. 741.

MARRIAGE CONTRACTS—*Continued.*

Although the judge may have charged improperly, yet, if the evidence would not have authorized a different verdict, it will be upheld. 7 An. 678; 10 An. 150.

As an act bad for one purpose may be good for another, the judgment rendered in a case may be pronounced an absolute nullity for want of jurisdiction, and yet the record therein may be legally admissible in another suit. The pleadings may contain admissions, or the rights of parties may otherwise be legally affected.

A court can not assume, for the purpose of excluding from being admitted in evidence, the record of a suit in which a wife appears as plaintiff, acting in her own interest and adversely to her husband, that the suit is really one in the interest of her husband; that the allegations of the petition are admissions in favor of her husband and really his own allegations. Charges to that effect can not be brought to bear by the way of objection to evidence. The court was not called on to stop the trial of the case and try separately issues raised by such objections.
Starns et al. vs. Hadnot et als., p. 318.

MARRIED WOMEN.

A notarial act executed by the wife, in which she sells her paraphernal property, is null and void as against her, if the same was executed under the coercive influence of the husband.

The wife is a competent witness as to the threats which induced her to sign said act. She is not confined in her attacks on said act to counter letters, interrogatories on facts and articles, but may resort to competent parol testimony to show the real character of the transaction.

The fact that no threats were heard by the notary, and that the wife was cool and self-possessed when she signed the act, and the testimony of relatives and neighbors that she made no complaint to them is negative in its character, and does not absolutely contradict the wife's positive testimony as to the threats made by the husband.

The threats once made are presumed to influence the wife and cause her silence until an opportunity is presented for the assertion of her right on the property alienated.

The silence of the wife doet not estop her. She is not bound by the doctrine of estoppel as usually understood.

MARRIED WOMEN—*Continued.*

In the sale of the wife's property under alleged threats, the fact that she received no benefit from the sale will corroborate to a certain extent her evidence as to the threats.

The wife may introduce parol testimony to show that the person who eventually acquired her property was in fact the original party for whose benefit the sale was made and is not an innocent third party who acted upon the apparent validity of the transaction.

Where a party is interposed and a simulated sale is made to him by the wife of her property, and it is then immediately sold to the husband, it is a sale direct from wife to husband, and therefore null and void.

A party who has a judgment in his favor can not obtain a new trial for the purpose of introducing corroborative evidence.

Vicknair, Wife of Lasseigne, vs. Trosclair, p. 373.

The court maintains the rules laid down in Miller vs. Handy, 33 An. 160, as regulating purchases on credit by a wife in community; but when a wife has so purchased and has actually paid, out of her own funds, two-thirds of the purchase price, besides all interest, taxes and expenses, and has held and administered the property in her own right for more than sixteen years, and for six of them after the death of her husband; when her husband went into bankruptcy and omitted this property from his schedule without complaint from any creditor; when the inventory of his succession omitted it without any such complaint; when the wife has died without any attack on her title, we consider that the laches and long acquiescence of the husband's creditors till after her death would relax the rigidity of proof ordinarily required in such cases, and that the evidence in this case would, under such circumstances, suffice to defeat an attack by them, which, however, has never been made or threatened, and is only suggested by an adjudicatee as an objection to accepting the title.

In this case the heirs of the husband are also sole heirs of the wife and are interested in maintaining the latter's title.

There would be no motive for attack by creditors in any event, because the unpaid price and restitution of wife's paraphernal funds would about absorb the value of the property.

Succession of Lewis, p. 833.

MARRIED WOMEN—*Continued.*

Whatever the secret equities between a vendor and vendee, and whatever their rights as between themselves, the former, who has placed on the public records a title valid on its face, can not urge such equities against a *bona fide* purchaser for value from the vendee, who acted on the faith of such recorded title.

This principle applies to married women who, in the exercise of powers conferred by law, have executed apparently valid sales of their paraphernal property.

The fact that the vendor has retained possession of the property sold might, in some cases, suffice to put the subsequent purchaser on his guard and impugn his good faith, but such fact loses all significance when his purchase has been made with the full knowledge and approval of the vendor and under her assurance that the vendee had the full right to dispose of the property.

The protection accorded by the law to married women can not be distorted into a means of defrauding innocent persons who have acted upon the faith of titles passed by them, apparently valid and fully warranted by law, and of their own representations to the same effect.

Broussard vs. Broussard, *p.* 1085.

MINORS AND THEIR TUTORSHIP.

The legal mortgage in favor of a minor in a partition sale attaches to the property formerly owned by the tutor.

Property sold to effect a partition contradictorily with the minor, and the co-proprietor who purchases the property retains in his hands the amount due the minor, and stipulates a certain mortgage to secure the same, the legal mortgage on the half of the property against the tutor, which rested on the property before it was acquired by the party holding in indivision with the minor, and the special mortgage can coexist. There is no inconsistency in the two claims, as they are distinct obligations, springing from distinct sources, and secured by separate and distinct mortgages.

Dodds vs. Lanaux, *p.* 289.

A tutor of minor heirs appointed in Louisiana, whose father was domiciled and died in Kentucky, has no power of administration over property not located in this State.

Moise, Tutor, vs. Life Association, *p.* 736.

MINORS AND THEIR TUTORSHIP—*Continued.*

A family meeting when convoked has the right to select others than those named in the order, when the latter do not attend. They can select those who ar not relatives, when no relatives are present.

If the proceedings and deliberations refer to the petition which prayed for the order and which was based on the averments therein and the deliberations are responsive, although briefly stated, to the objects for which the meeting was convoked, a purchaser of minor's property, ordered sold by said meeting, which was homologated, will be protected. A purchaser of minor's property, ordered sold by the advice of a family meeting, is not required to inquire into the personal qualifications of the members of the meeting. He has only to look to the regularity of the proceedings and the order homologating the same.

The sale of minor's property without the advice of a family meeting and order of court is null and void, and the purchaser is in bad faith.

Section 3 of Act 43 of 1882 is not in conflict with Articles 92 and 122 of the Constitution. The duties imposed upon the clerk in said section of said act are ministerial and mandatory.

Lemoine et al. vs. Ducoté et al., p. 857.

The recording in the office of the recorder of the certificate of the clerk of the court of the amount of the minor's property, according to the inventory on file in his office, operates as a legal mortgage in favor of the minor for the amount therein stated on all the immovable property of the tutor as a security for his administration, from the day of his appointment until the liquidation and settlement of his final account.

This mortgage is not only to cover administration of the particular money or property included in the inventory, but covers the eventual balance which will be due by the tutor at the close of the tutorship. All the property owned by the tutor during the tutorship is struck by this mortgage, whether acquired by him before or after the receipt of particular funds, and whether it had been sold prior to such receipt, unless said property had been withdrawn from the operation of the general mortgage by restricting the latter upon specific property, under the statutes specially providing for and governing such cases.

MINORS AND THEIR TUTORSHIP—*Continued.*

The inscription of the clerk's certificate having been once made can not be erased from the records until the close of the tutorship, although its effect may be restricted to particular property under conditions specially affixed by law.

Accounts of tutorship presented during minority and homologated contradictorily with the under-tutor are not final judgments fixing absolutely the relations between tutor and pupil up to a certain date—they are provisional in character, merely *prima facie* correct, and subject to revision and correction up to the final account of tutorship. When revised, and corrected, the amount actually due is supported by the mortgage resulting from the inscription originally made.

There is no law authorizing the absolute release of the tutor's personal responsibility or of the tutor's property from the legal mortgage securing that responsibility until the termination of his functions. *Schneider vs. Burns*, *p.* 875.

In directing proceedings against the tutor for his removal from the tutorship, the under-tutor is the proper person to commence the action. The judge, on information furnished him as to the necessity of the tutor's removal, can only appoint a curator *ad hoc* when there is no under-tutor.

When it is brought to the judge's attention that the funds of the minor have been sent beyond the State, he should at once direct the under-tutor to take necessary steps to protect the interest of the minor. *Welsh vs. Baxter*, *p.* 1062.

A sale of minor's property without an order of court, and on the recommendation of a family meeting, is null and void.

The adjudicatee at the sale of minor's property, without an order of court, can not be compelled to accept the same, on the deliberations of a family meeting called to ratify such illegal sale. His assent to the ratification is essential under Art. 1794 of the Civil Code.

An order for the sale of minors' property at private sale, under Act 25 of 1878, does not authorize a public sale of said property.

When minors' property has been illegally advertised for sale, no order of court having been granted for its sale, and a family meeting is convened, and they recommend the sale of the property on the terms and conditions as advertised, and the judgment

MINORS AND THEIR TUTORSHIP—*Continued.*

of homologation is rendered only a few hours before the sale, said sale can not be construed into a private sale made under the judgment rendered.

The adjudicatee, not having bargained for the property at private sale, can not be compelled to accept the title to said property, as it is on its face suggestive of future and serious litigation.

Mallard et al. vs. Dejan, p. 1270.

The recording of a judgment in favor of a ward against his tutrix, which is silent as to any mortgage securing payment of such judgment, and which contains nothing to show the name of the tutrix nor the date of tutorship, is not a legal compliance with the law of registry; and though the judgment may still be alive, the mortgage which secured it originally has ceased to exist if the inscription of the legal mortgage of the ward has perempted.

Smith vs. Lewis, p. 1457.

MORTGAGE.

One who, as security of negotiable notes, has executed a mortgage which he had the right and capacity to make, on property belonging to himself, by an act suggesting on its face no defect, duly recorded, and importing confession of judgment in favor of the mortgagee and any future holder of the note, can not destroy its value in the hands of a subsequent holder by pleading secret equities between the original parties created by his own fault, negligence or imprudence, of which the subsequent holder had no notice and no means of information.

The above rests on no assertion that mortgages are negotiable, but on other principles of law and equity fully stated in this and previous opinions.

When cases arise in which the above elements or some of them are missing, they will be determined according to their particular facts.

Under repeated decisions of the United States Supreme Court the objection that a national bank has loaned money on real estate in violation of the prohibition of the national banking laws does not lie in the mouth of the delinquent debtor of such loan, and does not disable the bank from enforcing the same by foreclosing the mortgage. The United States alone can complain of such violation.

Bank vs. Flathers, p. 75.

MORTGAGE—*Continued.*

The special mortgage, containing the *pact de non alienando* can be enforced against the vendee of the mortgagor, who assumes the mortgage debt.

The mortgagee in enforcing his special mortgage does not take the place of a vendor and become a warrantor to the vendee.

The *pact de non alienando* does not prevent the mortgagor from selling the property. Its effect is to permit the seizure of the property by the mortgagee in the hands of third persons by proceedings directly against the mortgagor without notice to third persons.

In the executory process the plaintiff who holds a legal mortgage on one-half the property, on the whole of which he has a special mortgage, can not in enforcing his special mortgage require the proceeds to be distributed so as to also satisfy his general or legal mortgage.

Dodd vs. Lanaux, p. 289.

As against a third possessor, a seizure under a mortgage against the owner taking place during the pendency of a plantation lease for the entire year, payable in kind out of the crops when gathered, only covers the proportion of rents due for the unexpired term after its date.

The transferee of a lease made by the owner prior to seizure has all the rights of a third possessor, so far as the rents under the lease are concerned.

Other questions decided on grounds of fact.

Thompson vs. Ratcliff, p. 474.

Property mortgaged with the pact *de non alienando* stipulated in the act of mortgage, and then sold and the vendee mortgages it, and while in his possession as third possessor he puts improvements on it which enhances the value of the property, the second mortgage creditor, the mortgagee of the third possessor, is entitled to the benefit of this enhanced value to satisfy his mortgage debt.

Bank vs. Miller et al., p. 493.

The recording in the office of the recorder of the certificate of the clerk of the court of the amount of the minor's property, according to the inventory on file in his office, operates as a legal mort-

MORTGAGE—*Continued.*

gage in favor of the minor for the amount therein stated on all the immovable property of the tutor as a security for his administration, from the day of his appointment until the liquidation and settlement of his final account.

This mortgage is not only to cover administration of the particular money or property included in the inventory, but covers the eventual balance which will be due by the tutor at the close of the tutorship. All the property owned by the tutor during the tutorship is struck by this mortgage, whether acquired by him before or after the receipt of particular funds, and whether it had been sold prior to such receipt, unless said property had been withdrawn from the operation of the general mortgage by restricting the latter upon specific property, under the statutes specially providing for and governing such cases.

The inscription of the clerk's certificate having been once made can not be erased from the records until the close of the tutorship, although its effect may be restricted to particular property under conditions specially affixed by law. Accounts of tutorship presented during minority and homologated contradictorily with the under-tutor are not final judgments fixing absolutely the relations between tutor and pupil up to a certain date—they are provisional in character, merely *prima facie* correct, and subject to revision and correction up to the final account of tutorship. When revised, and corrected, the amount actually due is supported by the mortgage resulting from the inscription originally made.

There is no law authorizing the absolute release of the tutor's personal responsibility or of the tutor's property from the legal mortgage securing that responsibility until the termination of his functions.

Schneider vs. Burns, *p.* 875.

A third possessor holding title to property judicially mortgaged for his vendor's debt may collaterally attack the validity of the judgment which is the foundation of the judicial mortgage which is sought to be enforced against it and show that same is null for any cause inherent in the judgment; yet his rights, in this respect, are just the same as those of his vendor, as judgment debtor—no greater and nothing less.

MORTGAGE—*Continued.*

Between the vendor and vendee there is a privity of contract which entitles the latter to *exercise* any right of the former, for his protection, notwithstanding he may have renounced or abandoned them.

The judicial mortgage takes effect from the day on which the judgment is recorded, with this modification by the statute of 1888, that judgments rendered at any term of the court, outside of the parish of Orleans, shall have no effect to create a judicial mortgage, *as between judgment creditors*, until from the day of the adjournment of the term at which same was rendered, although recorded prior to the adjournment of said term, the effect of that statute being to make the registry of several judgments, rendered at the same term, concurrent, and not to deprive them of any effect against the *debtor* until after the adjournment of the term.

Wolfe vs. Joubert et al., *p.* 1100.

Mortgages can be executed to secure an amount to become due.

Bank vs. Plow Co., *p.* 1214.

The mortgagor is not an essential party to a third opposition by a mortgagee contesting the validity and rank of other mortgages, and an answer on his part is in the nature of an intervention—he having not been cited.

In case the same person is sued by the same plaintiff in two different courts at one and the same time, for the same cause of action, and without tendering the declinatory exception of *litis pendens*, answers both demands, the *first* judgment rendered by either court would be valid and executory against the party cast in the action.

The Federal jurisprudence on this question is the same as our own.

The judgment of the court *a qua* having decreed the cancellation of one of the mortgages contested by third opponent, and this mortgagee not having appealed or filed an answer to the appeal, the *debtor is without interest* and this court without jurisdiction to alter it.

The same is true of the purchaser who has appealed.

The judge having directed the sheriff to retain the proceeds of sale subject to the further order of court, and he having acknowledged service and waived citation, the purchaser agreeing to

MORTGAGE—*Continued.*

become the stakeholder in his stead and consenting to pay such judgment as may be rendered against him for the proceeds, becomes thereby a party to the suit, and such an agreement is tantamount to a confession of judgment, and no further citation is required.

Bourgeois vs. Jacobs, *p.* 1310.

The recording of a judgment in favor of a ward against his tutrix, which is silent as to any mortgage securing payment of such judgment, and which contains nothing to show the name of the tutrix nor the date of tutorship, is not a legal compliance with the laws of registry; and though the judgment may still be alive, the mortgage which secured it originally has ceased to exist if the inscription of the legal mortgage of the ward has perempted.

Smith vs. Lewis, *p.* 1457.

MUNICIPAL CORPORATIONS.

The ordinances of the city of New Orleans, where no power is conferred for that purpose, can not enlarge the statutes of the State.

A city ordinance inconsistent with and in conflict with the general policy of the State is illegal, null and void.

That part of Sec. 1, Ordinance No. 5046, which authorizes the imposition of a fine upon the husband or wife for neglecting to aid and support the family, the party not being charged with habitual drunkenness, is illegal, null and void.

State vs. Burns, *p.* 34.

The condition of the contract was that the contractor would be paid from a special fund, if voted on favorably by the voters at a special election.

The contractor can not recover judgment against the defendant parish and ignore the means agreed upon to secure his payment.

The special election was ordered and held in contravention of a prohibitory law, and was null and void.

A municipal corporation can not be estopped from pleading and showing that certain acts were not within the scope of its authority.

The doctrine of estoppel in its application to municipal corporations is subject to restrictions and qualifications.

MUNICIPAL CORPORATIONS—*Continued.*

The question being one of original power to hold a special election, and not one relating to the compilation of the votes and declaring the result, is not one exclusively within the discretion of the police jury. It is subject to judicial inquiry and decision.

Byrnes vs. Parish, p. 392.

A resolution adopted by the council of a municipal corporation authorizing and directing its mayor to enter into a contract with a third person, when not acted on by the mayor and when no contract is made, does not of itself create a contract.

City of Baltimore vs. City of New Orleans, p. 526.

The powers conferred upon the Common Council of New Orleans by the 7th section of Act No. 20 of 1882 (the city charter) are not suspended by the provisions of Act No. 82 of 1882.

The Legislature may delegate to municipal corporations power to adopt and enforce ordinances on matters of special local importance though general statutes exist relating to the same subjects. The same act may constitute a crime against the public law of the State and also a petty offence against a municipal regulation. The two offences in such a case being different each may be punished without violation of the constitutional prohibition against placing a person twice in jeopardy for the same offence.

Violations of municipal ordinances constitute a class of offences that are in general throughout the country proceeded against summarily, and the right of trial by jury can not be constitutionally demanded.

The question of fact which the Supreme Court is required under Act 81 of the Constitution of 1879 to examine into in respect to the legality or constitutionality of a fine, forfeiture or penalty are those which are necessary to be investigated for the purpose of determining those questions as to the fine, forfeiture or penalty imposed in an ordinance of a municipal corporation, not those which if the ordinance be upheld go to establish the guilt or innocence of the accused under the ordinance.

The General Assembly in conferring upon the Common Council of New Orleans the power it did in its charter, contemplated that it would adopt a standard of adulteration as to drinks, and that

MUNICIPAL CORPORATIONS—*Continued.*

adoption by it not being shown to be unreasonable or arbitrary, or as passing beyond a fair measure of correction for the evil against which it seeks to guard, is upheld.

State vs. Fourcade, p. 717.

The City Council of New Orleans has the right to designate the material with which a street may be paved.

The city charter requires that the furnishing of material for public works shall be given to the lowest bidder; but there is a proviso that the Council may reject any and all bids. This proviso in the charter was to obtain the material and the work at the lowest possible cost to the tax-payer after competition among bidders, and the proviso was intended for the same public interest—to protect the tax-payer from imposition, and while inviting competition to secure good material and responsible contractors.

While the City Council would not be justified, and the courts would intervene to protect the tax-payer in such event, to arbitrarily reject a bid, and thus defeat the object to be attained by competition, it is vested with a certain discretion in rejecting bids, which will not be controlled when exercised with prudence in the public interest.

Paving Co. vs. City, p. 911.

Under the general welfare clause to be found in all municipal charters, which is often implied from the other powers granted, the city or municipality can not enlarge these powers further than necessary to carry into effect the specific power granted.

All that the city of New Orleans can do in relation to boilers and steam machinery, under its charter, is to locate them, so that in case of explosion they will do the least injury.

Ordinance No. 6647, "an ordinance providing for the inspection of steam boilers, tanks, pipes, apparatus, etc., and to create a board of examiners and inspectors of engineers in charge of same, and to provide for penalties," is illegal, null and void.

State vs. Robinson, p. 954.

In its application to municipal corporations particularly, the estoppel pleaded must be unequivocal and certain.

MUNICIPAL CORPORATIONS—*Continued.*

The terms of the contract between plaintiffs and defendant's assignor, and the statutes, made the official promulgation of the returns of the special election a condition precedent to any ordinance by the council levying the special tax.

Prior to the promulgation giving sanction to the election as held, the tax-payers can not be compelled to pay the special tax.

Construction Co. vs. Mayor et al., p. 1024.

It is the policy of the law to require of municipal corporations a strict observance of their powers.

A power can not be exercised where it is not clearly comprehended within the terms of the right sought to have recognized and enforced.

The judgments of the relator are restricted for payment to specific years. The restriction is part of the judgment, made so in express terms.

The council was without authority to vary from the terms of the judgment.

The judgments are restricted, in term, for payment to the years 1880, 1882, 1883, 1884, 1885, 1886 and 1889. Mandamus does not lie to compel payment from the revenues of 1893.

The writ of mandamus does not create a new authority.

Whatever rights the judgment creditor may have, can not be recovered in mandamus proceedings.

State ex rel. Fernandez vs. City, p. 1389.

A municipal corporation, which is a creation of the law and a State functionary, can exercise only those powers which have been expressly delegated to it, and those which are necessarily implied as inherent to its existence and thus absolutely indispensable for administration and maintenance in the accomplishment of the functions for which it was put in being and given life.

A municipal corporation has no right to enforce ordinances which it has the power to pass, by fine and imprisonment, or other penalty, unless that right has been unquestionably conferred by the law-giver.

The words of the city charter, which provide for the punishment of any violations of city ordinances by fine or imprisonment, refer

MUNICIPAL CORPORATIONS—*Continued.*

to ordinances which the common council is authorized, in terms, to pass and have executed in reference to the preservation of the peace and good order of the city, and the maintenance of its cleanliness and health; and they also extend to and embrace the ordinances and regulations the common council is authorized to pass with reference to obstructions in the public streets or alleys of the city—same being a necessary police regulation.

Natchez alley, though not a street *eo nomine*, is a *locus publicus* dedicated to public use, and comes within the terms of the statute and the ordinance.

A proceeding of this kind is of a *quasi* criminal character, and in no sense a civil suit involving title to property.

State vs. Lochte, *p.* 1405.

An ordinance of the city of New Orleans which makes it unlawful for any one to sell, barter, exchange or otherwise dispose of any lottery ticket or token of any kind, is a police regulation within the meaning of the city charter and the State Constitution, and is neither illegal or unconstitutional.

State vs. Dobard, *p.* 1412.

The City Council of New Orleans has no power to enact an ordinance requiring parties conducting a legitimate business to give bond for the faithful discharge of duties connected with said business, and to answer in damages to any one who may be injured in dealing with persons conducting such business.

Ordinance 6609, council series, is null and void, being illegal and unconstitutional.

State vs. Von Sachs et al., *p.* 1416.

NATIONAL BANKS.

Under repeated decisions of the United States Supreme Court the objection that a national bank has loaned money on real estate in violation of the prohibition of the national banking laws does not lie in the mouth of the delinquent debtor of such loan, and does not disable the bank from enforcing the same by foreclosing the mortgage. The United States alone can complain of such violation.

Bank vs. Flathers, *p.* 75.

NEGLIGENCE.

See Contributory Negligence.

NEGOTIABLE PAPER.

One who, as security of negotiable notes, has executed a mortgage which he had the right and capacity to make, on property belonging to himself, by an act suggesting on its face no defect, duly recorded, and importing confession of judgment in favor of the mortgagee and any future holder of the note, can not destroy its value in the hands of a subsequent holder by pleading secret equities between the original parties created by his own fault, negligence or imprudence, of which the subsequent holder had no notice and no means of information.

The above rests on no assertion that mortgages are negotiable, but on other principles of law and equity fully stated in this and previous opinions.

When cases arise in which the above elements or some of them are missing, they will be determined according to their particular facts.

Under repeated decisions of the United States Supreme Court the objection that a national bank has loaned money on real estate in violation of the prohibition of the national banking laws does not lie in the mouth of the delinquent debtor of such loan, and does not disable the bank from enforcing the same by foreclosing the mortgage. The United States alone can complain of such violation.

Bank vs. Flathers, p. 75.

Notwithstanding a negotiable promissory note may be executed and made payable at a future date to the order of the payee, only as collateral security for a running account of the maker with the payee, the fact of it having such future and contingent consideration does not make same liable to equities between said parties in case the payee shall have assigned same to another holder for value before maturity.

It can not affect the negotiability of a note that its consideration is to be hereafter realized, or that, from some contingency, it may never be enjoyed. Any one having sufficient confidence in another to give his written obligation for something to be given or enjoyed hereafter is at liberty to do so, and the maker can not

NEGOTIABLE PAPER—*Continued.*

censure any future holder for having purchased it; for it was the faith of the maker in the payee that he would execute his promise and allow no obstacles to defeat it that created the note and gave currency to it.

A transfer before maturity of a piece of commercial paper, not endorsed at date of transfer, acquires an equitable but not a legal title thereto; and the subsequent actual endorsement thereof before maturity does not operate the exclusion of equities between the maker and payee, of which the transferee has had notice in the meantime.

Pavey vs. Stauffer, *p.* 353.

NEW ORLEANS.

The ordinances of the city of New Orleans, where no power is conferred for that purpose, can not enlarge the statutes of the State.

A city ordinance inconsistent with and in conflict with the general policy of the State is illegal, null and void.

That part of Sec. 1, Ordinance No. 5046, which authorizes the imposition of a fine upon a husband or wife for neglecting to aid and support the family, the party not being charged with habitual drunkenness, is illegal, null and void.

State vs. Burns, *p.* 34.

The City Council of New Orleans has the right to designate the material with which a street may be paved.

The city charter requires that the furnishing of material for public works shall be given to the lowest bidder; but there is a proviso that the council may reject any and all bids. This proviso in the charter was to obtain the material and the work at the lowest possible cost to the tax-payer after competition among bidders, and the proviso was intended for the same public interest to protect the tax-payer from imposition, and while inviting competition to secure good material and responsible contractors.

While the City Council would not be justified, and the courts would intervene to protect the tax-payer in such event, to arbitrarily reject a bid, and thus defeat the object to be attained by competition, it is vested with a certain discretion in rejecting bids, which will not be controlled when exercised with prudence in the public interest.

Paving Co. vs. City, *p.* 911.

NEW ORLEANS—*Continued.*

Under the general welfare clause to be found in all municipal charters, which is often implied from the other powers granted, the city or municipality can not enlarge these powers further than necessary to carry into effect the specific power granted.

All that the city of New Orleans can do in relation to boilers and steam machinery, under its charter, is to locate them, so that in case of explosion they will do the least injury.

Ordinance No. 6647, "an ordinance providing for the inspection of steam boilers, tanks, pipes, apparatus, etc., and to create a board of examiners and inspectors of engineers in charge of same, and to provide for penalties," is illegal, null and void.

State vs. Robertson, p. 954.

NOTARIAL RECORDS.

It is made the duty of the custodian of notarial records to collect and safely keep in his possession the records of notaries who have ceased to be such.

An acknowledgment can not be invoked to maintain the custody of public records which the statute provides shall be delivered to the custodian of notarial records.

A notary's records, after his term of office, are a part of the notarial records and should be delivered to the State to be safely kept for the convenience of the public.

State ex rel. Custodian Notarial Records vs. Theard, p. 680.

OWNERSHIP.

The possessor of real estate under an *unrecorded lease* is thereunder invested with no right whatsoever as against a seizing attachment creditor.

Flower & King vs. Pearce & Son, p. 853.

OYSTER BEDS.

Act 110 of 1892 prohibits the sale by the register of the land office of natural oyster beds in the bays, lakes, bayous, inlets, coves, bordering on the Gulf of Mexico, and all that part of the Gulf of Mexico within the jurisdiction of the State. No one can acquire title therefore from the State of natural oyster beds located in any of the above described waters.

Land and Fisheries Company vs. Gasquet et al., p. 759.

PARTITION.

The active mass of a partition should include a statement of all the assets of the succession and a statement of the amounts which each of the heirs owes to the succession.

Succession of Dumestre, *p.* 200.

The legal mortgage in favor of a minor in a partition sale attaches to the property formerly owned by the tutor.

Property sold to effect a partition contradictorily with the minor, and the co-proprietor who purchases the property retains in his hands the amount due the minor, and stipulates a special mortgage to secure the same, the legal mortgage on the half of the property against his tutor, which rested on the property before it was acquired by the party holding in indivision with the minor, and the special mortgage can coexist. There is no inconsistency in the two claims, as they are distinct obligations, springing from distinct sources, and secured by separate and distinct mortgages.

Dodds vs. Lanaux, *p.* 289.

A written agreement, intended to evidence a final settlement of accounts, which is prefaced by an enumeration of various properties owned by the contracting parties jointly and separately; and which contains a statement to the effect that an undivided one-half interest in each is to be transferred to the other, so that "each will own an undivided half interest" in all, taken as a whole, is rather to be given the effect of a confirmative or recognitive act, explanatory of the status of the property, than that of a new title which is coupled with a condition, or depending for its completion upon the happening of a future and uncertain event.

Upon this recognition of title a suit may be brought by either party for a partition of the common, or partnership property.

Murphy vs. Murphy, *p.* 433.

The rules relating to collations and succession partitions are expressly excepted from application to other partitions. Rev. C. C. 1290.

Ordinary partitions involve only property held in common, and can only arise between co-owners of such property.

PARTITION—*Continued.*

A claim for money by one co-owner against another, in which all the co-owners are not concerned, can not be injected into the action for partition, not being incidental thereto, being an issue in which the plaintiff here has no concern, and not germane to the issue.

City of Baltimore vs. City of New Orleans, p. 526.

Where defendants in a partition suit except that one of the co-plaintiffs who alleges himself to be the natural tutor of his minor child is not such, and on the trial of their exception show that although, under an order of court authorizing the father to qualify as tutor, he had taken an oath as such; that he had never caused, as the law requires, the abstract of inventory of the minor's property to be recorded, which protects the minor through a mortgage; and that no letters of tutorship had ever been issued, the exception should be sustained as to this co-plaintiff, who should be dismissed from the suit, and it should be remanded to be proceeded with according to law.

The fact that, on the application of a father so claiming to be tutor, a family meeting had been called by the court to consider whether the father as tutor should institute a partition suit—that it had recommended that he should do so—that its deliberations had been homologated and the suit authorized to be brought by the judge will not cut the defendants, who are third parties, off from their rights of protection against possible sacrifice of the property and future litigation arising from proceedings of questionable validity.

Defendants in partition suits having direct substantive rights of their own and interested not only in the price to be obtained, but in the title to be conveyed, by reason of their continuing obligations as co-vendors of the property to be sold, have the right to insist that proceedings of doubtful legality which have not yet reached consummation but are in process of formation should be placed securely beyond the danger point and not permitted to pass on to finality. *Hewes et als. vs. Baxter*, p. 1049.

PARTNERSHIP.

The insolvency of the partnership and that of the individual partner having by an order of court been consolidated in one case to be decided in one judgment, form but one suit.

PARTNERSHIP—*Continued.*

The separate creditors having been compelled by the consolidation to prove their claims in these consolidated proceedings, have the right to vote for the discharge or against the discharge of the debtor.

The separate creditors of one of the partners have an interest in his estate in the partnership, for, if there is any balance of the estate of the partnership after payment of its debts, such balance must be divided and appropriated to and among the separate estates of the several partners according to their respective rights and interest therein, and the sum so appropriated to the separate estate of each partner must be applied to the payment of the separate debts.

Reilly & Co. vs. Creditors, p. 470.

Section 2668 of the Revised Statutes of 1870 was borrowed from the New York legislation on the subject, and the courts of that State have interpreted its intent to be, to prevent the use of the name of a person not interested in the firm, thus inducing a false credit to which it was not entitled, and this on the strength of a name which had been withdrawn, or in which there was no authority to use.

The object of the law was to prevent the obtaining of credit, secured by fraudulent representations, but not to prevent the giving of credit, and after it was given and the day of settlement had come, prevent the party infringing the statute from demanding payment of his debtor.

Wolfe vs. Joubert et al., p. 1100.

PETITORY ACTIONS.

As against a defendant whose claims in a petitory action are found to rest only on possession and prescription under it, plaintiff need not show a title perfect in all respects; one apparently good will suffice.

Where the officers of the United States in the matter of relocation of a cultivation and settlement right have dealt with a person as the holder of the same under a derivative title, he will be entitled to hold such a position *prima facie* as against a person contesting it collaterally as a defendant in a petitory action, in which action he does not show title, but has to rely upon possession. *Kernan vs. Baham et als.*, p. 799.

PETITORY ACTIONS—*Continued.*

A plaintiff in a petitory action against a party in possession of the property, exhibiting title, must recover on the strength of his title. Resting his title on a tax deed, he must not only show a *prima facie* title, but one absolutely good. The recital in a tax deed that all the requisites of law were complied with will not excuse the production of proof *aliunde* that the essentials prerequisite to the sale were complied with.

The effort of plaintiff in a petitory action to sustain his title by a plea of prescription against an attack thereon by defendant can not be countenanced.

Where two parties claim the same property, under different conveyances, and one of them leases the property from the other, he abandons his title and can not afterward set up the same title against the party from whom he leased the property.

Lambert vs. Craig, *p.* 1109.

The plaintiff in a petitory action must recover on the strength of his own title and not on the weakness of defendant's. A party in possession who is charged with holding possession without title will be maintained in the same against one who exhibits no title at all.

Landry vs. Landry, *p.* 1113.

PLEADINGS.

The burden of pleading does not devolve upon the defendant unless he has a special defence.

Sued as a "third possessor," the defendant pleaded affirmatively, and alleged *inter alia* that the mortgage claim of plaintiff did not attach, for causes assigned, to the properties plaintiff seeks to have sold.

Though the descriptive allegations were not as clear and complete as they should have been, notice was given to the opposite party of the grounds of defence, and it furnishes ample evidence in all future controversies of what was decided on the issue presented.

The ruling of the District Court admitting the testimony remains.

The notice of demand was signed by the sheriff and not by the clerk. The irregularity is cured if the defendant allows the property to be sold without objecting.

PLEADINGS—*Continued.*

Proceedings to sell property under an order of seizure and sale, after the seizure of the property, were not stayed by the mere commencement of proceedings in the United States District Court.
Sales made by virtue of "writs of seizure and sale" which were issued, and the seizure made prior to the enactment abolishing them and completed subsequently under the authority of courts to which they were transferred, are not null.

Chase vs. Gas Light Co., *p.* 300.

A party is not allowed to amend his pleadings of course—he must apply for and obtain leave from the court to do so.

Tullos vs. Lane, *p.* 333.

Verbal precision is not exacted, and technicalities are not favored in our system of pleading. Regard is paid to the general force and meaning of the allegations considered altogether, and when, thus considered, they present a cause of action, they should be given effect.
A petition alleging that property sued for is on the premises of the defendant corporation, that it is there held under a written acknowledgment given by an officer of the corporation, and that the corporation refuse to deliver, presents a sufficient charge of possession in defendant to sustain an action for restoration of the property.

Kellar vs. Lumber Co., *p.* 476.

When a former suit between the parties has been discontinued by the plaintiff after a new trial had been granted him on his application, defendant can not successfully plead *lis pendens* by reason of his having filed in the first suit a reconventional demand for the value of improvements made on a tract of land, and for taxes paid by him when judgment is only asked in his behalf, in the event plaintiff should obtain judgment against him on the question of title to the land. When plaintiff's demand was discontinued, defendant's claim—merely contingently advanced—fell. *Clark vs. Comford et al.*, *p.* 502.

When a third opposition has for its object to set aside an order of sequestration on the ground that it has been effected on property claimed by a third party, such opposition is considered

PLEADINGS—*Continued.*

as a separate demand, distinct from the suit in which the order was granted, and opponent must be considered as plaintiff in an action of revendication. 12 An. 341.

A third opponent who does not attack either plaintiff's claim or the privilege which he asserts as securing it on property sequestered, but in his pleadings only raises a question as to the ownership of the proporty, is restricted to the single issue which he has tendered.

O'Neil vs. Walker Bros., p. 609.

In a purely personal action by a creditor against his debtor, another ordinary creditor has no right to intervene and oppose the demand, at least when fraud and collusion between the parties is not charged.

Imhof vs. Imhof, p. 706.

In a purely personal action by a creditor against his debtor, another ordinary creditor has no right to intervene and oppose the demand, at least when fraud and collusion between the parties is not charged.

Lincoln vs. Express Co., p. 729.

When the complaint is that the surviving member of a commercial partnership has, unauthorizedly, surrendered, along with his own interest in its assets, the interest of a deceased member of the firm, which had *previously* passed under a separate administration, *held:* It is the correct course to pursue for the alleged legal representative of the said decedent to institute a direct action against the syndic of the insolvent for the restitution of the property, and not for the revocation of the latter's letter of appointment, and the judge's order of acceptance of his surrender.

Calder & Co. vs. Their Creditors, p. 765.

A plaintiff who attacks an act not *per se* wrongful, but which may be perfectly consistent with good faith and fair dealing, must aver and specify the facts giving to it a different character.

Up to judgment the pleadings are taken most strongly against the pleader, and unknown, unrecited facts are not assumed in his favor.

Hughes vs. Murdock et al., p. 935.

PLEADINGS—*Continued.*

Although plaintiff and defendant were both residents of the same parish at the inception of the suit, yet if plaintiff subsequently removes to a different parish the defendant having a cause of action against him is not compelled to follow him at his new domicil, but under Art. 375, C. P., may bring his demand by way of reconvention in the original suit, provided, at least, he does not thereby retard or delay the progress of plaintiff's action.

The object of the proviso to C. P. 375 is to secure a common forum for the settlement of controversies between the same parties, and to dispense a defendant who has been impleaded in the court of his domicil from the necessity of seeking his adversary in a different forum in order to propound an action against him.

The question as to the forum in which the reconventional demand may be urged depends on the conditions existing at the time when it is filed.

Rigney vs. Monette, *p.* 940.

Prohibition is not a writ of right, and in cases where the jurisdiction is even doubtful, it is not readily granted when there exists an adequate remedy by appeal.

The nature of a cause of action is not to be confounded with its sufficiency. The nature of the action determines jurisdiction, and when that sustains the jurisdiction the latter can not be defeated by mere insufficiency of the allegations or of the proofs.

The petition in this case alleges acts committed under the present as well as under the former terms of relator in office; and even if the latter were open to relator's exception (on which we express no opinion), that would only eliminate them from the petition, without abating or defeating the action.

If the respondent judge has committed error in overruling relator's exception, that error does not lie in maintaining jurisdiction, but in sustaining a partially insufficient cause of action; and for such error the only appropriate relief would be by appeal.

State ex rel. Reid vs. Judge, *p.* 943.

The mortgagor is not an essential party to a third opposition by a mortgagee contesting the validity and rank of other mortgages, and an answer on his part is in the nature of an intervention—he having not been cited.

PLEADINGS—*Continued.*

In case the same person is sued by same plaintiff in two different courts at one and the same time, for the same cause of action, and without tendering the declinatory exception of *litis pendens*, answers both demands, the first judgment rendered by either court would be valid and executory against the party cast in the action.

The Federal jurisprudence on this question is the same as our own.

Bourgeois vs. Jacobs, p. 1310.

Where the cause of action is not within the jurisdiction granted by law to the tribunal it can dismiss the suit at any time it is brought to its notice.

State ex rel. Lamouraine vs. Judge, p. 1316.

In case a party makes application for a respite in the court of one parish, and subsequently to same being granted he permanently changes his domicil to another parish, it is competent for a creditor, complaining of his failure to comply with the award, to proceed, by rule taken in the court of first instance, to compel him to make a surrender under the insolvent law. Act 134 of 1888 amending R. C. C. 3093 is ample warrant for thus proceeding.

State ex rel. Marks vs. Judge, p. 1349.

In case an exception of no cause of action is sustained in the District Court, the suit dismissed and an appeal is prosecuted to the Circuit Court of Appeals, the latter is without authority or jurisdiction to dispose of the case finally upon its merits on the theory that such an exception admits the truth of plaintiff's allegations for all the purposes of the case.

Such question does not involve the regularity and correctness of the judgment of said court, but their right to render any judgment in that attitude of the case.

State ex rel. Negrotto vs. Judges, p. 1437.

The preparation of a petition in its mechanical arrangement is left to the taste of the attorney.

The only requisite for it is that it be a written or printed document, prepared in accordance with Arts. 171, 172, Code of Practice.

PLEADINGS—*Continued.*

If for convenience, and as a matter of taste, the attorney uses a green blank form of a petition as a part of it, on which is printed the address to the court, and typewriting on white sheets for the other part, both fastened or pasted together so that the green blank form is the last sheet, but so arranged that the printed address appears above the typewriting, and the whole thus arranged is a logical statement of the cause of action, it is a compliance with Arts. 171, 172, Code of Practice.

The caption or address to the court is an essential part of the petition, and it can not be omitted in the copy served on the defendant.

The service of citation will not cure this defect.

Lukis vs. Allen, p. 1446.

PLEDGE.

An agreement by which a person transfers movable property to another, but which leaves the vendor in possession, with the right for six months as the nominal agent of vendor to sell the property, repay the purchase price with interest and appropriate the surplus for himself, is simply a pledge without delivery under the name of a sale with power of redemption. Bourg vs. Lopez, 36 An. 440.

O'Neil vs. Walker Bros., p. 609.

POLICE BOARD.

Sec. 6 of Act 63 of 1888 authorizes the police board of the city of New Orleans to appoint a superintendent of police and other subordinate officers of the force, and, *with the sanction of the mayor*, to promulgate all rules, regulations and orders to the police force through the superintendent.

Sec. 16 thereof provides that the police board, in furtherance of the police government, and for promoting and perfecting the police discipline of officers and subordinates of the police force, are empowered, *in their discretion*, to enact, modify and repeal, from time to time, orders, rules and regulations of general discipline.

The powers and duties imposed are essentially and altogether different—those of the former relating to general rules governing the force, while those of the latter relate to police government and discipline. Of the latter, the statute has given the police board absolute and discretionary power, entirely free from the sanction and control of the mayor.

Mayor vs. Superintendent of Police, p. 1477.

PRESCRIPTION.

A person who with the consent of the owner of a tract enters into possession of the same under a promise of sale, and on contemplation of the consummation thereof, with the obvious understanding that he was to have all rights of ownership short of ownership itself, but under the obligation to pay interest on the purchase price from the date of the agreement, is not a possessor in bad faith, but his possession is not of such a character as to enable him to acquire the property under the prescription of ten years—he did not enter on the land under a title translative of property and he can not change the character of his possession. *Clark et al. vs. Comford et al.*, p. 502.

The items which figure on the credit side of an account furnished by an agent at the instance of the heirs of his principal are not barred by the prescription of either three or five years.

Where a principal in a written instrument dated in 1884 acknowledging himself to be then indebted to his agent for his services authorizes him to pay the debt and interest from the net profits of a plantation of which he continues him the management and the possession, the heirs of the principal can not successfully plead against such claim either the prescription of three or five years, when at their instance and being still in possession he renders them an account and net profits to cover his claims are not shown. *Beattie vs. Hawkins et al.*, p. 512.

The extent of the rights of the husband and father regulate those of the widow and heirs, who succeed to all his rights and those of the community, but they are transmitted with all their defects as well as their advantages, the change in the proprietor producing no alteration in the nature of the title or possession.

An act of partition is not an act "translative" of but only "declaratory" of property—it does not create a new title or give a new possession, and it does not serve as a basis for the prescription of ten years.

The prescription of ten years requires good faith as its basis, and the owner sufficiently shows bad faith in proving that the present possessors hold the property as heirs and widow in community of another who was not himself in legal good faith. The widow claiming community rights is not a third person *quoad* the community.

PRESCRIPTION—*Continued.*

Under its exceptional legislation relative to property bank mortgages, it was the intention of the Legislature to protect those mortgages against any adverse right of ownership or possession subsequent to their date and up to their maturity or enforcement.

Kernan vs. Baham et als., p. 799.

The principal's acts will be liberally construed in favor of a ratification.

A principal notified of the acts of his agent must disapprove them, within a reasonable time, or he will, by his silence, ratify them.

A judgment carried on a final tableau of distribution and partly paid in the final settlement of the succession, and duly homologated, after notification, binds the heirs, who will not be heard to plead its nullity on the ground of defective citation served upon their ancestor, the judgment debtor.

The authority of an agent can not be contested, more than twenty years having elapsed since the agency was alleged and the judgment obtained.

More than ten years have elapsed since the property was purchased by plaintiff's author in good faith, and a title acquired which was legal and sufficient to transfer the property.

Johnson vs. Carrere, p. 847.

PRINCIPAL AND AGENT.

See Mandate.

PRIVILEGES.

The facts shown in this case justify and sustain the writs of sequestration and attachment as against the defendant.

Under the present Constitution, privileges on movables do not require to be recorded, but have the same validity and effect with or without registry.

Act 89 of 1886 establishing the rank and order of privileges on crops can not be given a retrospective operation so as to give to a pledge of the crop under Act 66 of 1874 preference over an antecedent privilege valid and subsisting at the date of the pledge. The latter takes effect on the property at its date and subject to valid antecedent privileges, and the law only refers to privileges arising subsequent to the pledge.

PRIVILEGES—*Continued.*

When a plantation is held by a party under a conditional agreement of sale, with authority from the owner to possess, use and cultivate the same, and under no contract of lease or rent, a merchant who advances and acquires a privilege on the crop under such conditions can not be affected by a subsequent change of arrangements and the execution of a lease creating a lessor's privilege. The lessor's privilege only arose after date of lease and took effect on the crop only as it then stood subject to the antecedent privilege.

Plaintiff's right to arraign the transactions between defendant and intervenor are, under the facts of this case, limited to the extent necessary to protect his privilege—they are valid against ordinary creditors.

Flower & King vs. Skipwith, p. 895.

PROHIBITION.

Under Act 96 of 1888, where a party has been cited to deliver up leased premises and he appears and pleads a general denial, and judgment is rendered against him, it is too late to urge matters for the writ of prohibition that ought to have been pleaded in the court below.

State ex rel. Duthoo vs. Judge, p. 213.

The proceedings in the lower court being regular, legal and within the jurisdiction of the judge thereof, the writs applied for are refused.

State ex rel. Scallen vs. Judge, p. 241.

Prohibition is not a writ of right, and in cases where the jurisdiction is even doubtful, it is not readily granted when there exists an adequate remedy by appeal.

The nature of a cause of action is not to be confounded with its sufficiency. The nature of the action determines jurisdiction and when that sustains the jurisdiction the latter can not be defeated by mere insufficiency of the allegations or of the proofs.

The petition in this case alleges acts committed under the present as well as under the former terms of relator in office; and even if the latter were open to relator's exception (on which we express no opinion), that would only eliminate them from the petition, without abating or defeating the action.

PROHIBITION—*Continued.*

If the respondent judge has committed error in overruling relator's exception, that error does not lie in maintaining jurisdiction, but in sustaining a partially insufficient cause of action; and for such error the only appropriate relief would be by appeal.

State ex rel. Reid vs. Judge, p. 943.

PUBLIC ADMINISTRATOR.

When there is an heir present or represented in the State who opposes the application of the public administrator for the administration, and applies for it himself, the law accords the preference to such heir or his representative.

It does not affect the case that, at the date of the application by the public administrator, the absent heir was not represented; if, at the date of his timely opposition, he was duly represented, his rights are secured.

A party who, with the exercise of the utmost possible diligence, has been unable to secure his proofs, which he shows are actually in the mail on their way, is entitled to the trifling necessary delay, and is protected in such application by Art 464, C. P.

Succession of White, p. 632.

PUBLIC OFFICERS.

The remedy invoked by relator embodied in Section 352 of the Revised Statutes, which, having reference to official bonds, declares that "For the acceptance of the sureties offered upon the bond the assent shall be unanimous, and on refusal to accept any surety, the district or parish judge shall have the power upon application in vacation, as well as in term time, to compel them to show cause why they do not accept such surety; and in all such cases the parties whose duty it is to judge of the sureties offered shall, on demand of the party complaining, certify to the judge their decision and the evidence on which it was based, whose duty it shall be to decide immediately thereon and from his decision in the case there shall be no appeal," though styled in the proceedings a "mandamus," is not strictly such; it is a special statutory remedy expressly authorizing the district judge to review the action of certain officials in respect to a particular matter, and on due and legal cause not having, in his opinion, been shown to justify the same, to reverse that action, to pronounce in the

PUBLIC OFFICERS—*Continued.*

case the decision which those officers should have made and to order them to do that which they should have done originally.
State ex rel. Bourgeois vs. Police Jury, p. 249.

The issuing of a commission to an officer who is in arrears to the State, and the giving of time by the Auditor for him to make his settlement, does not operate as a discharge to the sureties on his official bond.

The liability of the sureties on the official bond continues for a reasonable time after the term of the officer expires, for the making of a new bond. This reasonable time is fixed in this State by law. The Constitution continues all officers in office until their successors are qualified. Under Act 58 of 1877, the Governor can not issue a commission until thirty days after a general election. Under Act 19 of 1878, the newly commissioned officer has thirty days after the receipt of his commission in which to take the oath of office and file and record his bond. The liability of the sureties then continues until thirty days after the receipt of a new commission, or until a new bond is filed and recorded.

Certified statements from the books of the Auditor of Public Accounts are *prima facie* evidence of the condition of the officer's accounts with the Auditor's office.

A tax collector is properly charged with the tax roll and licenses issued to him, the whole of which he is presumed to have collected unless rebutted by legal vouchers for legal payments. 40 An. 234. *State vs. Lake et al.*, p. 1207.

In a suit under Art. 171 of the Constitution to have a sheriff declared ineligible because he is a defaulter, the quietus of the auditor, although given after his election, the receipts of the parish treasurer and receipts of the auditor, the manner in which the police jury makes its settlement with the tax collectors, the amount paid the parish treasurer to show that this was only a partial payment, parol and written testimony as to the fact of defalcation are all admissible in evidence.

The suit to remove an ineligible officer for defalcation is conducted under Art. 171, and not Arts. 196, 201.

In a suit of this kind the State does not have to give bond for an appeal.
State ex rel. District Attorney vs. Sheriff, p. 1231.

PUBLIC OFFICERS—*Continued.*

Acts denounced by Art. 196 of the Constitution in a prior term of office, by any officer who is his own successor, may form the foundation for a suit for removal from office, under Art. 201 of the Constitution.

Acts committed by an officer in no way connected with his official conduct can not form the foundation for a suit under Art. 201 of the Constitution.

State ex rel. District Attorney vs. Sheriff, p. 1350.

PUBLIC ROADS.

Public roads in Louisiana are established in three ways: (1) by dedication: (2) by expropriation; (3) by the exercise of a public servitude imposed by law.

The soil of public roads belongs to the owner of the land on which they are made, and in case of roads bordering navigable streams that ownership is unimpaired, except to the extent of the servitude imposed and defined by Art. 665, Rev. C. C., and that definition clearly confines the servitude to uses and works of a public character.

The construction of a private railroad forexclusive private use is entirely beyond the servitude imposed by law, and can no more be made on that portion of an owner's land occupied by a public road than on any other portion of his estate.

Statutes and decisions referring to the construction of railroads on public streets and roads embrace only railroads which act as public carriers and are of a public character. No law and no decision ever recognized the right to construct or operate a private railroad on a public highway.

The rights of the abutting owner are of a different character from those of other members of the general public and where his rights as owner are unwarrantably invaded by the unlawful construction of private works on his property entirely outside of any servitude due thereby, he is entitled to the ordinary remedies of an owner without the necessity of proving special and immediate injury.

Bradley vs. Pharr, p. 427.

RAILROAD ACCOMMODATION.

Act 111 of the Legislature of 1890, regulating accommodations of the races on railways, does not violate the thirteenth amendment of the United States Constitution, because such accommo-

RAILROAD ACCOMMODATION—*Continued.*

dations involve no badge of slavery or involuntary servitude which is the sole subject of that amendment. Civil Rights Cases, 109 U. S. 3.

A long line of decisions, State and Federal, maintain that statutes or regulations enforcing the separation of the white and colored races in public conveyances and in public schools, so long at least as the facilities or accommodations provided are substantially equal, do not abridge any privilege or immunity of citizens or otherwise contravene the fourteenth amendment of the United States Constitution.

In such matters, equality, and not identity or community, of accommodations is the extreme test of conformity to the requirements of the amendment.

The regulation of domestic commerce is as exclusively a State function as the regulation of interstate commerce is a Federal function. The statute is an exercise of the police power and expresses the legislative conviction that the separation of the races in railway conveyances, with proper sanctions for substantial equality of accommodation, is in the interest of the public order, peace and comfort. It is a matter of legislative power and discretion with which courts can not interfere.

A proper construction of the statute does not (as contended by relator) authorize a conductor to assign a passenger to a coach to which his race does not belong; nor does it bind the passenger to accept such wrongful assignment, nor exempt the officers or companies from actions for damages in case of such wrongful assignment and refusal to carry when disobeyed. The discretion vested in the conductor to decide primarily the coach to which each passenger belongs is only that necessary discretion attending every imposition of any duty to determine whether the circumstances, under which the duty arises, exist. He exercises such discretion at his peril and at that of his employer.

Ex parte Plessy, p. 80.

RECEIVERS.

The same issues are presented in State ex rel. Gaiser vs. Judge, No. 11,330, slightly varying in statement, and as the reasons and authorities therein given are directly applicable, a conclusion similar is followed.

RECEIVERS—*Continued.*

The only question is one of authority *vel non* to appoint a receiver, and the legality of a resolution of the company approving the appointment.

The issues must come up on appeal, if at all, after proof heard before the court of first instance.

State ex rel. Fox & Searles vs. Judge, *p.* 114.

In fixing the *quantum meruit* of the services of a liquidator of a partnership appointed by the court, the judgment of the lower court is entitled to great weight, and will not be disturbed unless manifestly erroneous.

The fees of attorneys employed to file and homologate the liquidator's account are a proper charge against the estate, and do not lose that character because they are partially devoted to maintaining the liquidator's charge for his services, which forms a proper element of his accounting.

Baxter vs. Hewes et al., *p.* 1065.

Property in the hands of a receiver, acting under the orders of the court, can not be seized by a creditor.

The office of an attachment or sequestration is to seize and hold property until the further orders of the court. Being already in the hands of an officer of the court, for distribution among creditors, the object to be accomplished by a seizure is attained. A creditor basing his rights on property in the hands of a receiver appointed by the State court, on writs issued from a Federal court, which are referred to the State court having jurisdiction of the property, he has no cause to complain of an order of the State court ordering the property to be sold when his debt is recognized and referred to the proceeds of sale. He can not appeal from the order to sell the property, as it can not irreparably injure him.

State ex rel. Paper Co. vs. Judge, *p.* 1418.

REGISTRY.

Where a party disposed of lands in his lifetime and the deed was recorded in the parish in which they were situated, and these lands afterward became a part of a new parish and the act of sale was not recorded in the new parish, the heirs of the deceased can not claim title to said land on account of the failure to record the deed in the new parish. *Chambers vs. Haney*, *p.* 447.

INSERTED THROUGH ERROR

REGISTRY—*Continued.*

The possessor of real estate under an unrecorded lease is thereunder invested with no right whatsoever as against a seizing attachment creditor.

Flower & King vs. Pearce & Son, p. 853.

The recording of a judgment in favor of a ward against his tutrix, which is silent as to any mortgage securing payment of such judgment, and which contains nothing to show the name of the tutrix nor the date of tutorship, is not a legal compliance with the law of registry; and though the judgment may still be alive, the mortgage which secured it originally has ceased to exist if the inscription of the legal mortgage of the ward has peremptied.

Smith vs. Lewis, p. 1457.

RESPITE.

The effect of a decree approving and homologating the deliberations of a meeting of creditors granting their debtor a respite is to create a judicial contract between the debtor and his creditors, by which the debtor is allowed a delay for the payment of the sums which he owes them, and as the debtor's property is the common pledge of his creditors, and the contract is binding on all the creditors, the law did not and could not contemplate conferring on any one creditor the right of annulling the contract without judicial process, on the ground of its alleged violation by the debtor, and applying the property to the satisfaction of his individual claims. 35 An. 917; 44 An. 823.

The vote of a single creditor is not a mere offer to make a new contract between the particular creditor and the debtor, but a *quasi* judicial act by which the rights of the other creditors are to be affected; the other creditors should therefore be made parties to any proceeding to annul or modify the order granting the respite. The court will *ex proprio motu* notice the want of proper parties where the judgment asked for will unavoidably and vitally affect the rights of third parties not before it. 14 An. 30; 7 La. 62.

Liquor and Tobacco Co. et al. vs. Jefferies et al., p. 621.

The granting of a respite to the debtor by creditors does not impair the privilege they may have on the debtor's property. The property burdened with the privilege can not be sold and

RESPITE—*Continued.*

the proceeds ratably distributed among the creditors—only the surplus, after satisfying the privileged debt, can be so distributed.

Bennett vs. Creditors, p. 1019.

REVOCATORY ACTION.

Plaintiff's judgment is for an amount less than two thousand dollars.

The judgment prayed for, to rescind and annul the conveyance of their debtor, was revocatory and not *en déclaration de simulation.*

In a revocatory action the test of jurisdiction is the amount claimed by the creditor, and not the value of the property, the sale of which the plaintiffs seek to have revoked.

Moore, McKinney & Co. vs. Ringuet et al., p. 1115.

SALE.

If he who proposes should, before consent is given by the promisee, change his intention, the concurrence of the two wills is wanting and there is no contract.

A mere proposal to sell may be revoked at any time before acceptance.

A condition dependent upon the will of the party to whom an offer to sell immovable property is made should be reduced to writing to secure its binding effect.

Miller vs. Douville & Gallagher, p. 214.

A vendor, until delivery to his vendee, occupies the position of a precarious possessor. His "detention" of the property sold is his vendee's "possession" of the same.

If a vendor could before delivery by some act of his own, such as is termed by the French commentators an "acte de contradiction," place himself in a position of hostility to his vendee and alter the character of his possession from that of its origin by an "interversion of possession," it would be required of him for the purpose of acquiring ownership of the property by the thirty years' prescription that he should clearly establish that knowledge of this change of position had been brought home by him to his vendee.

Rae vs. Bundy, p. 398.

SALE—*Continued.*

Where an agent is authorized to sell and dispose of certain lands, and he exchanges them for other lands, the principal ratifies the act if he sells the lands which his agent received in exchange.

A copy of a copy of an authentic act is inadmissible in evidence, unless the original is alleged and proven to be lost and that a copy thereof can not be obtained.

Where a party disposed of lands in his lifetime and the deed was recorded in the parish in which they were situated, and these lands afterward became a part of a new parish and the act of sale was not recorded in the new parish, the heirs of the deceased can not claim title to said land on account of the failure to record the deed in the new parish.

Chambers vs. Haney et als., *p.* 447.

Unless the lessor timely claims damages suffered under the first lease, after a second has been made, with the same lessee, there is acquiescence, which precludes a claim for damages.

The purchaser is presumed to buy the accessory rights to the property transferred, but damages suffered by the vendor, before the sale, are a personal right not transferred, and can not be recovered without an express subrogation.

The purchaser acquires rights to rent from date of sale, and does not take prior rents due.

Mathews vs. Alsworth, *p.* 464.

An exception to a petition addressed "To the 18th Judicial District Court of the State of Louisiana, holding sessions in and for the parish of Livingston," on the ground that the number of the district was erroneously stated was properly overruled—the mistake was an immaterial clerical error.

When a former suit between the parties has been discontinued by the plaintiff after a new trial had been granted him on his application, defendant can not successfully plead *lis pendens* by reason of his having filed in the first suit a reconventional demand for the value of improvements made on a tract of land, and for taxes paid by him when judgment is only asked in his behalf, in the event plaintiff should obtain judgment against him on the question of title to the land. When plaintiff's demand was discontinued, defendant's claim—merely contingently advanced—fell.

SALE—*Continued.*

An agreement whereby "the party of the first part agrees to sell" to the party of the second part a certain tract of land known as the Governor's Bluff tract, in the parish of Livingston, "said to contain 1278 30-100 acres."

"The party of the second part agreeing to pay to the party of the first part $2 per acre, on terms as follows: Five hundred dollars cash, on the 1st day of September, 1872, and the remainder in two equal payments, payable on the 1st day of May, 1873, and the 1st day of May, 1874, with interest at the rate of 8 per cent. per annum from date until paid"—in respect to which agreement the party of the second part pleaded that under the terms thereof "he was to pay $2 per acre for said land, and notarial title was to be given when the title of the party of the first part could be completed;" held to be a promise of sale and not a sale, when the testimony shows that at the time of said agreement the title thereto had not been confirmed by the government, and that under a conviction that the same would soon be confirmed, the party of the second part went into immediate possession of the land by consent—under the obvious understanding that in the interval he should have all the rights of ownership short of ownership itself, but with a liability to pay interest on the purchase price from the date of the agreement.

The agreement contained the elements upon which both the "thing sold" and the price to be paid might ultimately be fixed, but the number of acres to be purchased was uncertain, dependent upon a subsequent confirmation of the tract and a survey of the same, and the object of the sale being uncertain, the price also was uncertain, being fixed at $2 for each acre.

A party in an agreement to sell land when his title is completed, who does not allege that he has as yet a confirmation of the land, made a survey, or done any act whatsoever in furtherance of the execution of the agreement, can not ask that the same be set aside until he shall have done so, and the other party is in default. In the meantime the parties must remain in the position in which they were originally placed by consent—the proposed purchaser in possession with the qualified right conveyed at the time of entry, but with the obligation to pay interest from date of the agreement and with eventual rights of both left open.

Clark et al. vs. Comford et al., p. 502.

SALE—*Continued.*

A party holding an authentic deed of sale, perfect on its face, executed by the decedent, is not required to stand by and see the property sold at judicial sale as the property of the vendor's succession under an order of sale provoked by his administratrix which could only be sustained by proof that the sale was a pure simulation. He may rightfully enjoin such a sale.

The allegations of the administratrix that the price of the sale was not paid, and that the thing sold had not been delivered, do not necessarily import the nullity of the sale. C. C. 2456.

If the act of sale evidenced a real transaction, whatever its character, the administratrix could not ignore it or attack it collaterally, but could only claim its judicial revocation by direct action.

As between the parties, the verity of authentic sales can only be assailed by a counter-letter or by answers to interrogatories on facts and articles.

The letters of plaintiff's produced as the equivalent of a counter-letter do not evidence an acknowledgment that the sale was a simulation, but, on the contrary, assert that it was real and based on valuable consideration.

Thompson & Co. vs. Herring, p. 991.

In case a judgment creditor causes property standing in the name of another to be seized and advertised for sale as that of his judgment debtor, he undertakes the burden of proving the title of such third person to be a simulation.

But if such third person's title emanates from the judgment debtor, who is suffered to retain actual possession, under a precarious title, there is reason to presume the sale is simulated, and the burden of proof is on such purchaser to show that the transaction was in good faith and establish the reality of the sale.

In this latter event the burden of proof is sufficiently discharged by the production of a judicial title supported by confirmatory and corroborating circumstances of contemporaneous date.

Yale & Bowling vs. Bond & Williams, p. 997.

Whatever the secret equities between a vendor and vendee, and whatever their rights as between themselves, the former, who has placed on the public records a title valid on its face, can not urge such equities against a *bona fide* purchaser for value from the vendee, who acted on the faith of such recorded title.

SALE—*Continued.*

This principle applies to married women who, in the exercise of powers conferred by law, have executed apparently valid sales of their paraphernal property.

The fact that the vendor has retained possession of the property sold might, in some cases, suffice to put the subsequent purchaser on his guard and impugn his good faith, but such fact loses all significance when his purchase has been made with the full knowledge and approval of the vendor and under her assurance that the vendee had the full right to dispose of the property.

The protection accorded by the law to married women can not be distorted into a means of defrauding innocent persons who have acted upon the faith of titles passed by them, apparently valid and fully warranted by law, and of their own representations to the same effect.

Broussard vs. Broussard, p. 1085.

A lessee, in possession of a newspaper plant and paraphernalia thereto appertaining, can not convert himself into an owner thereof without the knowledge and consent of his lessor and by the unique and simple process of changing his name and capaciy from editor and publisher to editor and proprietor.

One purchasing such plant from the person who has thus sought to convert himself into an owner has the duty imposed upon him of scrutinizing the claims of the vendor, particularly if he has been advised of the previous existence of the relations of landlord and tenant.

If, in addition, the proof shows that such purchaser has been fully advised and informed by the vendor of the source of his title, and of the negotiations through which he acquired title, he can not found any equity or plead any estoppel raised on the aforesaid apparent change of proprietorship of the paper.

Reid et al. vs. Mayo et als., p. 1091.

Plaintiff placed the title to her property in the name of her creditor as owner as security in his favor.

Many years afterward it was conveyed by the party in whose name the title was to a third party, with plaintiff's consent.

Plaintiff subsequently became the lessee of the property.

It not being proven that the parties intended to create an act of mortgage in adopting the form of the sale:

SALE—*Continued.*

The consideration not being greatly inadequate:

The act of sale and the lease concurring in sustaining the sale, it must be held that it was a sale and effect given to the authentic deed between the parties.

Wilkins vs. Durio et al., *p.* 1119.

The plaintiff sold cement to the defendant, subject to a test.

During the delay required to test the cement the defendant was to have possession.

The bill of lading representing the cargo was tendered to the defendant, who refused possession. The plaintiff in thus tendering complied with his obligation as vendor.

The defendant violated the conditions by not receiving the goods.

After the defendant had refused to receive the property, the plaintiff did not sell the goods, but kept them a considerable time, and did not attempt to minimize the damages.

The damages allowed are the price the defendant bound himself to pay, less the market value of the article.

Jochams vs. Ong, *p.* 1289.

SCHOOL CERTIFICATES.

All questions as to the validity of the school certificates herein involved. as to the authority under which they were issued, and as to the right of the owner thereof to proceed against the School Board and recover the precise judgment herein asked, were settled by our decision in Fisher vs. School Board, and will not be reopened.

These certificates were not payable at any fixed date, but out of particular funds, and only when such funds so applicable are actually covered into the treasury, and prescription only runs from the date when such funds were found in the treasury. It is not proved, and we can not assume, that such funds existed beyond the term of either the five or ten years' prescription. Kingbridge vs. Otoe, 124 U. S. 459.

The title of plaintiff depends on proof of endorsement of the certificates by parties to whom they were payable. As to the mass of certificates, sufficient proof is made, but as to certain designated classes proof is wanting.

Gasquet vs. City Schools, *p.* 343.

SEIZURE AND SALE.

See Execution.

SEPARATION FROM BED AND BOARD.

See Marriage.

SEQUESTRATION.

The remedy is by appeal, and not by writs of certiorari and prohibition.

If the plaintiff does not choose to furnish a bond of release, after ten days have elapsed, subsequent to the sequestration of the property, the defendant is not precluded from the right to bond.

The right to bond property sequestered is not suspended by a suspensive appeal from a judgment in which that right is not involved.

State ex rel. Stuart vs. Judge et al., p. 1322.

SHERIFF.

A sheriff under the direction of a court of competent jurisdiction and carrying out its orders is not responsible in damages.

Crow et al. vs. Sheriff et al., p. 1221.

In a suit under Art. 171 of the Constitution to have a sheriff declared ineligible because he is a defaulter, the quietus of the auditor, although given after his election, the receipts of the parish treasurer and receipts of the auditor, the manner in which the police jury makes its settlement with the tax collectors, the amount paid the parish treasurer to show that this was only a partial payment, parol and written testimony as to the fact of defalcation are all admissible in evidence.

The suit to remove an ineligible officer for defalcation is conducted under Art. 171, and not Arts. 196, 201.

In a suit of this kind the State does not have to give bond for an appeal.

State ex rel. District Attorney vs. Sheriff, p. 1231.

SIMULATION.

In case a judgment creditor causes property standing in the name of another to be seized and advertised for sale as that of his judgment debtor, he undertakes the burden of proving the title of such third person to be a simulation.

SIMULATION—*Continued.*

But if such third person's title emanates from the judgment debtor, who is suffered to retain *actual* possession, under a precarious title, there is reason to presume the sale is simulated, and the burden of proof is on such purchaser to show that the transaction was in good faith and establish the reality of the sale.

In this latter event the burden of proof is sufficiently discharged by the production of a judicial title supported by confirmatory and corroborating circumstances of contemporaneous date.

Yale & Bowling vs. Bond & Williams, *p.* 997.

SLANDER.

The proof disclosing that plaintiff's daughter had eloped with a young man, at night, on foot, and alone, and that they passed the latter half of the night at a stranger's house, together, the defendant was justified in stating to a party of friends, who had been called together in consultation in regard to the matter, the nature and character of certain rumors that were in circulation in the neighborhood, in reference to her improper intimacy with the person with whom she had eloped, as a reason that induced him to believe that they should immediately get married in case of their capture by the parties in pursuit of them at the time.

Such a statement is utterly wanting in malice, the essential ingredient of defamation and slander.

Lester vs. Corley, *p.* 1006.

SUCCESSIONS.

An account filed by an executor, which purports a partial distribution of the proceeds of sales and of rents collected among creditors of the succession he is administering, when duly homologated according to law, after due publication, is final and conclusive as to all the world—heirs as well as creditors—in respect to the amount and validity of the claims opposed; and, as to heirs as well as creditors, such judgment of homologation constitutes *res adjudicata* in respect to the amount and validity of said claims—though they have not been personally cited.

But, in respect to the payment of such claims—a condition subsequent to judgment—an account approved and homologated, constitutes only *prima facie* evidence of payment, subject to attack by heirs or creditors in a direct action.

Succession of Conrad, *p.* 89.

SUCCESSIONS—*Continued.*

The active mass of a partition should include a statement of all the assets of the succession and a statement of the amounts which each of the heirs owes to the succession.

The husband, as head of the community, and not the wife, is responsible for rent of property occupied by him and his wife, who is an heir and has an interest in the property.

Succession of Dumestre, p. 200.

A question of fact only is presented in this case.

From the testimony in the record the fee of the attorney for absent heirs is fixed at $700. *Succession of Auld*, p. 248.

Accretion is based upon the theory that the title to the thing bequeathed is conveyed in its entirety to each and every one of the legatees named, and that hence when one or more of the legatees dies before the legacy vests, this fact leaves the title intact in each of the survivors in its entirety but with simply fewer persons to share in it on partition. The word accretion is not strictly exact, it should rather be non-decretion.

Where a testator, after appointing testamentary executors "with seizin of his (my) estate to administer and apply the same as hereinafter written, viz., all and every sum of money of which I die possessed, and all and every article of value pertaining thereto which may accrue to his (my) estate," next makes nine separate legacies of $1000 in gold to each of nine persons, closes his will with the clause "I desire should any money or aught of value accrue to my estate from any claim exhibited in the papers which I leave or otherwise, that the same be paid severally and proportionally to the persons named and stated in this paper, to whom I leave cash in gold," three of the special legatees die before the testator there is no room for the application of the doctrine of accretion. The will contains no "disposing clause" of the remainder, which is referred to by way of payment to and distribution, and not by way of bequest. The "title" to the remainder never vested in the nine legatees or any of them. The clause can only be considered from the standpoint of a "payment," and when so considered the testator obviously directed that each of the nine special legatees should separately receive one-ninth of the remainder after payment of the special legacies, debts, charges and costs.

SUCCESSIONS—*Continued.*

The six survivors neither gained nor lost by the death of the three others, and the lapsed legacies devolved on the legal heirs.

Succession of Hunter, p. 262.

The administration of the estate of the husband involves that of the community.

The heir who is the donee of property of the community donated by her father may collate it in kind during the life of her mother.

The latter consented to the collation, and claimed her interest in the property collated.

The title tendered is legal. *Berthelot vs. Fitch et al.*, p. 389.

The proof disclosing that a non-resident or foreign executor has presented and had the will of the testator duly recorded in a court of this State, conformably to law, and obtained the appointment of testamentary executor, and qualified as such, such appointee is entitled to exercise the duties of his trust notwithstanding he has furnished no bond or other security, nor caused an inventory to be commenced within the ten-day limit fixed by law.

The law makes it the duty of a non-resident executor to give security for such sum, and under such conditions as are required of dative testamentary executors, and they are required to give security in the *same manner*, as curators of vacant successions are; and such curator can only be removed from office in a direct action instituted by the attorney for absent heirs, after due citation.

In such case there is no existing vacancy that can be filled by the appointment of the public administrator as dative testamentary executor; and he is without interest or authority to institute proceedings for the removal of a testamentary executor in order to create a vacancy that he may fill by obtaining such appointment. Nor can a rule propounded by an attorney for absent heirs having such object in view be of any greater force, or avail—such attorney having been appointed on the petition of the public administrator as an incident to the administration that he proposed to inaugurate. This claim to administration failing at the threshold, that of the attorney for absent heirs must necessarily pass out of court, also.

Succession of Withers, p. 556.

SUCCESSIONS—*Continued.*

When there is an heir present or represented in the State who opposes the application of the public administrator for the administration, and applies for it himself, the law accords the preference to such heir or his representative.

It does not affect the case that, at the date of the application by the public administrator, the absent heir was not represented; if, at the date of his timely opposition, he was duly represented, his rights are secured.

A party who, with the exercise of the utmost possible diligence, has been unable to secure his proofs, which he shows are actually in the mail on their way, is entitled to the trifling necessary delay, and is protected in such application by Art. 464, C. P.

Succession of White, p. 632.

A Louisiana court has no valid authority to appoint an administrator to a person who was domiciled and died in Kentucky, and who left no property in this State.

Moise, Tutor, vs. Life Association, p. 736.

A judgment carried on a final tableau of distribution and partly paid in the final settlement of the succession, and duly homologated, after notification, binds the heirs, who will not be heard to plead its nullity on the ground of defective citation served upon their ancestor, the judgment debtor.

Johnson vs. Carrere, p. 847.

The qualified recognition of a legacy by the executor will not carry with it the payment of interest prior to demand for its delivery.

A disposition by will in which the property donated is to remain in the hands of the executor until a legatee who has arrived at the age of majority shall be twenty-four years of age can not be distinguished from one that seeks to prohibit the sale or other exercise of the right of ownership and is therefore an impossible condition, illegal and to be reputed as not written.

The persons and estates of minors are placed under the power of tutors and under-tutors.

Interest on particular legacies is due from the day of demand for its delivery.

Succession of Stephens, p. 962.

SUCCESSIONS—*Continued.*

Neither the domicil nor the residence of Myra Clark Gaines was in Louisiana. In 1885 she was temporarily in the State, but her domicil at that time was in Kings county, in the State of New York.

By her death her succession was immediately opened at her domicil, independently of her having property at that time in New York. Whether that succession as to its character was legal or testamentary was a question necessarily to be determined by the Probate Court of the domicil. The unity of the succession was not destroyed by the fact that portions of the property might be located in different jurisdictions in different States, and because, from motives of public policy, or the operation of local laws, property so situated might be partially or entirely withdrawn from the control of the laws of the State of the domicil or subjected for the same reasons to special restrictions.

The Probate Court of Kings county, New York, was unquestionably authorized to have presented to it an instrument purporting to be the last will and testament of the deceased, and, after due proceedings and inquiry had, to determine whether it was such last will and testament under the laws of the place of the domicil.

Upon presentation to the Civil District Court of a duly authenticated record of the Probate Court of the domicil of a deceased person probating a certain instrument as the last will and testament of that person, and ordering its execution, it was the duty of that court also to recognize the instrument as such last will, notwithstanding the fact that the instrument had been once offered in the Civil District Court for probate, and as a matter of original probate the probate had been refused on the ground that it did not, as to form, comply with the laws of Louisiana. When the instrument was presented the second time, the Civil District Court was not called on to deal directly with and on the instrument as a matter still in *pais* for the purpose of determining whether it was the last will and testament of the deceased; that question had passed on to and been determined by the court competent and authorized to do so, and it was merged in the judgment of that court. A recognition of the will as such when presented under such circumstances was perfectly consistent with the correctness of the original decree of the Civil District Court refusing to probate it as an original question. A recogni-

SUCCESSIONS—*Continued.*

tion of the instrument as the last will of the deceased will not necessarily carry with it an execution in Louisiana of all the provisions of the will. If there be any parties in this State creditors, or others who have legal right to contest its provisions, those rights will remain unaffected by the simple recognition as a fact that the instrument is the last will of the deceased. An ancillary succession having been opened in this State, before property can be withdrawn from the hands of the administrator, proceedings contradictorily with him will have to be taken which will furnish ample opportunity to all parties legally interested to protect their rights.

The fact that the decree of the Probate Court of Kings county, New York, has been appealed from devolutively does not present any legal reason for not recognizing presently in Louisiana the decree. *Succession of Gaines*, *p.* 1287.

A demand against a succession, unsupported by written proof, for services alleged to have been rendered the decedent more than ten years before making the demand, in pressing a certain claim before the Common Council of New Orleans, will be rejected. *Succession of Gaines*, *p.* 1424.

STALE DEMANDS.

A demand against a succession, unsupported by written proof, for services alleged to have been rendered the decedent more than ten years before making the demand, in pressing a certain claim before the Common Council of New Orleans, will be rejected. *Succession of Gaines*, *p.* 1424.

SURETYSHIP.

A mere declaration by a creditor that he would not execute his judgment until a certain person should return from Europe is not such a granting of time as would release the debtor's surety. Even had the words used been unequivocal, they being expressive of mere intent did not create any obligation nor estop the creditor. C. C. 1814, 1815.

Mere forbearance or delay of a creditor in enforcing his rights against the principal does not release the surety, who may, if he chooses, pay the debt, and becoming subrogated to the creditor's right control the claim to his own satisfaction.

SURETYSHIP—*Continued.*

A surety upon an unconditional obligation to pay has no right when sued to attempt in that suit, to which the principal debtor is not a party, to adjust collaterally an unliquidated claim for damages for inexecution of a contract between the latter and the creditor, which the principal debtor has not himself claimed or asserted.

Purdy vs. Forstall et als., *p.* 814.

The issuing of a commission to an officer who is in arrears to the State, and the giving of time by the Auditor for him to make his settlement, does not operate as a discharge to the sureties on his official bond.

The liability of the sureties on the official bond continues for a reasonable time after the term of the officer expires, for the making of a new bond. This reasonable time is fixed in this State by law. The Constitution continues all officers in office until their successors are qualified. Under Act 58 of 1877, the Governor can not issue a commission until thirty days after a general electon. Under Act 19 of 1878, the newly commissioned officer has thirty days after the receipt of his commission in which to take the oath of office and file and record his bond. The liability of the sureties then continues until thirty days after the receipt of a new commission, or until a new bond is filed and recorded.

State vs. Lake et al., *p.* 1207.

TAXATION.

When a mechanic is employed to do a particular piece of work—for instance, to do the carpenter's work on a house, or to plaster, or to paint the same, and he works at his trade and employs others to assist him in the work, he is exempt from the license tax in pursuance of Art. 206 of the Constitution. City vs. Bayley, 35 An. 545; City vs. Lagman, 43 An. 1180.

But when he undertakes to build houses generally and only superintends the work and performs only such mechanical labor on them as his pleasure may dictate, or to show or direct those employed by him, he does not follow exclusively on the buildings, employing others to assist him, but he is a contractor or master builder, employing others to do the work, exclusive of his labor. City vs. O'Neil et al., 43 An. 1182; City vs. Pohlman, 45 An. —.

State vs. McNally, *p.* 44.

TAXATION—*Continued.*

When a mechanic goes outside of his occupation and employs others in a different pursuit, such as brickmasons, painters and slaters, in the erection of buildings, his business is that of contractor and he is not exempted under Article 206 of Constitution from paying license tax. *City vs. Pohlman, p.* 219.

A building contractor is not exempted from license under Article 206 of the Constitution, because, in connection with his business as contractor, he does some mechanical labor. Affirming City vs. Pohlman and City vs. McNally, 45 An.
City vs. Leibe, p. 346.

Shingles, laths, matched ceiling, dressed flooring, sidings, palings dressed and headed, fencing laths, mouldings, car sidings cut to lengths, dressed finished mouldings, casing moulding base boards, are articles of wood, ready for immediate, convenient and general use, and exempt from taxation under Article 207 of the Constitution. *Lumber Co. vs. Assessors et al., p.* 454.

"Articles of wood," in Article 207 of the Constitution, refers to a particular substance or commodity manufactured from lumber, by hand, by art, or machinery, ready for immediate, convenient and general use, complete in themselves without further manipulation or work on them.

Shingles, laths, cross-ties, dressed lumber, planed, tongued and grooved; weatherboards planed, dressed and ready for general use; mouldings, sashes, doors and blinds, boxes, pickets, turned stair work are such articles of wood, complete in themselves, ready for immediate, convenient and general use, without further manipulation or work on them.

"Articles of wood," such as planks, joists, sills, etc., which are intended for parts of a particular structure are not such articles as are intended for general, immediate and convenient use, each complete in itself. *Lumber Co. vs. Sheriff, p.* 456.

Shingles, laths, pickets, cross-ties, dressed flooring, moulded window casing, dressed and beveled weatherboarding, car roofing, car siding cut to length, are articles of wood ready for immediate and convenient use, and are exempt from taxation under Art. 207 of the Constitution.
Lumber Co. vs. Tax Collector, p. 459.

TAXATION—*Continued.*

It has been definitely settled by repeated decisions of this court that privileges and mortgages securing municipal taxes of years antecedent to 1877 are imprescriptible, but those securing taxes subsequent to 1877 are prescriptible by the terms of different revenue laws—the one applicable to the city taxes in question being that of 1886, fixing the period of prescription at three years.

Notwithstanding there is no recital in the *proces verbal* of adjudication to the State, or in the act of sale from the auditor to her vendee, that taxes previously assessed against the property are assumed as part of the purchase price, the terms of the statute, on the authority of which the sales are made, must control, and charge the purchaser from the State with full knowledge that such assumption is a condition of the sale.

It is axiomatic and well settled law that the sovereign, being owner of property, can sell same, fix the price and impose such conditions of sale upon purchasers as she deems fit and proper; and, in the absence of any interfering constitutional prohibition, the General Assembly may provide for such property being subjected to municipal taxation during the time of her proprietorship.

State ex rel. Dowers vs. Recorder et al., p. 566.

An unknown owner of assessed immovable property is one who has no agent to represent him, and whose place of business, residence and postoffice address are not known to the tax collector.

Lands purchased from the State and described on the tax rolls in subdivisions, according to United States survey, are sufficiently described.

The description by subdivisions will control the number of acres alleged to exist on the tax roll and the tax deed.

Webre vs. Lutcher & Moore, p. 574.

The defendants are not carrying on business, nor are they engaged in trade, within the mesning of the statutes.

The statutes requiring licenses from those who "sell, give or otherwise dispose" of alcoholic drinks are within constitutional limitations.

Without regard to trade or business, or to the fact that the proceeds are not realized with a view to profit or for a livelihood, in-

TAXATION—*Continued.*

corporated institutions engaged in selling intoxicating liquors to their members owe a license under the paragraph of Sec. 11, of the license tax law, designating "sales, gifts or other disposition" as subject to a license.

State vs. Boston Club et al., p. 585.

Capital invested to be habitually used and primarily intended to be used for a particular purpose not giving exemption from taxation can not become exempt by reason of its being occasionally, exceptionally and accidentally used for another.

Dry docks are not constructed for the purpose of building, but of repairing boats.

Exemption laws are strictly construed.

Robertson vs. City, p. 617.

The "business of slaughter houses," as used in the license law of 1890, means the business of slaughtering animals for sale. It does not matter whether it is carried on in a house or in a shed, on his own property or on rented property; whether he slaughters his own animals or those of others—if the slaughtering is followed as a business, and is for public sale of the animals slaughtered, it is subject to the license.

Thibaut, Sheriff, vs. Hebert, p. 838.

In its application to municipal corporations particularly, the estoppel pleaded must be unequivocal and certain.

The terms of the contract between plaintiff's and defendant's assignor and the statutes, made the official promulgation of the returns of the special election a condition precedent to any ordinance by the council levying the special tax.

Prior to the promulgation giving sanction to the election as held, the tax-payers can not be compelled to pay the special tax.

Construction Co. vs. Mayor et al., p. 1024.

The produce taxes authorized by Act 74 of 1892 are local assessments and enfranchised from the limitations of the Constitution.

The legislative judgment embodied in the act creating the "Caddo Levee District," within defined lines, includes the persons and property which are benefited by the improvement proposed.

TAXATION—*Continued.*

It should not be reversed by judicial interposition unless error is evident.

The exact proportion of benefits can not be established in levying "local assessments" for public improvement.

The levee tax is due, although the benefit from the line of levees is not immediate and direct.

It is not manifest that the plaintiffs are not benefited and that they can not at any time be brought within the immediate benefits intended in establishing the Caddo Levee District.

George et al. vs. Sheriff and Tax Collector, p. 1232.

An assessment which does not contain a description sufficient to identify the property assessed is illegal and void, and, therefore, beyond the healing power of the curative statute of 1884—a sufficient description of the property being an indispensable prerequisite to the exercise of the taxing power.

There are certain requisites to a valid sale of property by a tax collector which can not be supplied or cured by subsequent legislation.

The object of a description is to enable the owner to ascertain from the list itself that the tax charged against him has been assessed upon his land and not upon that of a stranger.

Augusti et al. vs. Lawless et al., p. 1370.

In case it appears that the capital and machinery of a manufacturing establishment has only been actually employed for a part of a year, and not employed for a part of the year, an assessment for the whole of the year is erroneous.

Traction Co. vs. City, p. 1475.

TAX SALES.

It appearing that in previous years the property had not been assessed to any one, and not being able to obtain from the conveyance records of the parish wherein the same is situated, or by inquiry of the adjacent property owners, who is the proprietor thereof, it is permissible for the assessor to list it as that of an unknown owner. Such an assessment is not absolutely void and is sufficient basis for a tax title that will support the prescription of three years under the act of 1874.

Want of thirty clear days' advertisement is an informality that is prescribed by five years. *Robinson vs. Williams*, p. 485.

TAX SALES—*Continued.*

An unknown owner of assessed immovable property is one who has no agent to represent him, and whose place of business, residence and postoffice address are not known to the tax collector.

Lands purchased from the State and described on the tax rolls in subdivisions, according to United States survey, are sufficiently described.

The description by subdivisions will control the number of acres alleged to exist on the tax roll and the tax deed.

Webre vs. Lutcher & Moore, p. 574.

In tax sales under the Revenue laws as they formerly existed, notice to the tax-payer was an essential prerequisite to the seizure and sale. Where the law provided that a curator *ad hoc* must be appointed to the non-resident tax-payer, upon whom notice was to be served, the failure to have such curator *ad hoc* appointed renders the sale absolutely null and void.

Lambert vs. Craig, p. 1109.

An assessment which does not contain a description sufficient to identify the property assessed is illegal and void, and, therefore, beyond the healing power of the curative statute of 1884—a sufficient description of the property being an indispensable prerequisite to the exercise of the taxing power.

There are certain requisites to a valid sale of property by a tax collector which can not be supplied or cured by subsequent legislation.

The object of a description is to enable the owner to ascertain from the list itself that the tax charged against him has been assessed upon his land and not upon that of a stranger.

Augusti et al. vs. Lawless et al., p. 1370.

TRESPASS.

In an action for trespass under the general denial, defendant can show that the plaintiff was not the owner and not the possessor of the property.

Possession alone will support the action, but where property is owned by the State which it has declared it holds for the common benefit of all its citizens, one citizen can not obtain possession so as to exclude another, except under regulations prescribed by the State.

Land and Fisheries Co. vs. Gasquet et al., p. 759.

USUFRUCT.

A crop hanging by the roots when the usufruct is opened belongs to the usufructuary.

If the surviving partner in community does not choose to exercise her rights as usufructuary, but qualifies as administratrix of the estate of her husband and administers the affairs of the community, for whose account the fruits hanging by the roots are gathered and sold in the market, and the proceeds applied to the payment of the debts (leaving a balance due the community by the administratrix, which is placed to the credit of the community on her final account duly homologated), the syndic of her estate has no authority collaterally to attack the judgment of homologation, and recover funds as belonging to the usufructuary disposed of by her prior to her insolvency.

The survivor in community, transferee, is subrogated to the mortgagee's rights and entitled to the balance after its deduction upon settlement of accounts.

Caire vs. Creditors, p. 461.

WILLS AND TESTAMENTS.

The terms of the document presented for probate establish that the party intended to make a donation of the property not *inter vivos*, but *mortis causa*.

The will, olographic in form, was proven by two witnesses, who had seen the testator write and sign his name.

The other testimony supplements that of these two witnesses.

The declarations of the testator are admissible to prove that the document is in his handwriting, but not to prove his intentions.

Succession of Norvant, p. 207.

Where a testator, after appointing testamentary executors "with seizin of his (my) estate to administer and apply the same as hereinafter written, viz.: all and every sum of money of which I die possessed, and all and every article of value pertaining thereto which may accrue to his (my) estate," next makes nine separate legacies of $1000 in gold to each of nine persons, closes his will with the clause "I desire should any money or aught of value accrue to my estate from any claim exhibited in the papers which I leave or otherwise, that the same be paid severally and proportionally to the persons named and stated in this paper, to

WILLS AND TESTAMENTS—*Continued.*

whom I leave cash in gold," three of the special legatees die before the testator there is no room for the application of the doctrine of accretion. The will contains no "disposing clause" of the remainder, which is referred to by way of payment to and distribution, and not by way of bequest. The "title" to the remainder never vested in the nine legatees or any of them. The clause can only be considered from the standpoint of a "payment," and when so considered the testator obviously directed that each of the nine special legatees should separately receive one-ninth of the remainder after payment of the special legacies, debts, charges and costs.

The six survivors neither gained nor lost by the death of the three others, and the lapsed legacies devolved on the legal heirs.

Succession of Hunter, p. 262.

The qualified recognition of a legacy by the executor will not carry with it the payment of interest prior to demand for its delivery.

A disposition by will in which the property donated is to remain in the hands of the executor until a legatee who has arrived at the age of majority shall be twenty-four years of age can not be distinguished from one that seeks to prohibit the sale or other exercise of the right of ownership and is therefore an impossible condition, illegal and to be reputed as not written.

The persons and estates of minors are placed under the power of tutors and under-tutors.

Interest on particular legacies is due from the day of demand for its delivery.

Succession of Stephens, p. 962.

Neither the domicil nor the residence of Myra Clark Gaines was in Louisiana. In 1885 she was temporarily in the State, but her domicil at that time was in Kings county, in the State of New York.

By her death her succession was immediately opened at her domicil, independent of her having property at that time in New York. Whether that succession as to its character was legal or testamentary was a question necessarily to be determined by the Probate Court of the domicil. The unity of the succession was not destroyed by the fact that portions of the property might be

located in different jurisdictions in different States, and because, from motives of public policy, or the operation of local laws, property so situated might be partially or entirely withdrawn from the control of the laws of the State of the domicil or subjected for the same reasons to special restrictions.

The Probate Court of Kings county, New York, was unquestionably authorized to have presented to it an instrument purporting to be the last will and testament of the deceased, and, after due proceedings and inquiry had, to determine whether it was such last will and testament under the laws of the place of the domicil.

Upon presentation to the Civil District Court of a duly authenticated record of the Probate Court of the domicil of a deceased person probating a certain instrument as the last will and testament of that person, and ordering its execution, it was the duty of that court also to recognize the instrument as such last will, notwithstanding the fact that the instrument had been once offered in the Civil District Court for probate, and as a matter of original probate the probate had been refused on the ground that it did not, as to form, comply with the laws of Louisiana. When the instrument was presented the second time the Civil District Court was not called on to deal directly with and on the instrument as a matter still in *pais* for the purpose of determining whether it was the last will and testament of the deceased; that question had passed on to and been determined by the court competent and authorized to do so, and it was merged in the judgment of that court. A recognition of the will as such when presented under such circumstances was perfectly consistent with the correctness of the original decree of the Civil District Court refusing to probate it as an original question. A recognition of the instrument as the last will of the deceased will not necessarily carry with it an execution in Louisiana of all the provisions of the will. If there be any parties in this State creditors, or others who have legal right to contest its provisions, those rights will remain unaffected by the simple recognition as a fact that the instrument is the last will of the deceased. An ancillary succession having been opened in this State, before property can be withdrawn from the hands of the administrator, proceedings contradictorily with him will

WILLS AND TESTAMENTS—*Continued.*

have to be taken which will furnish ample opportunity to all parties legally interested to protect their rights.

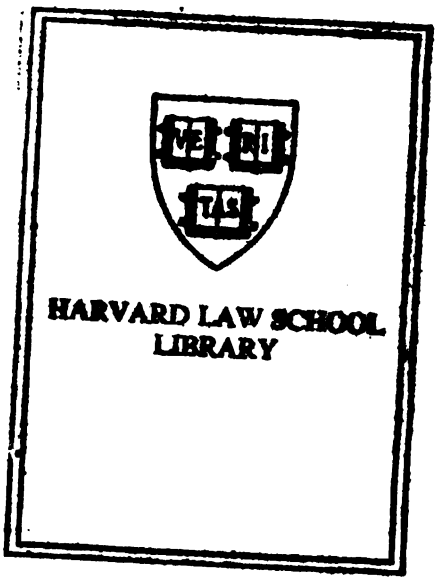
The fact that the decree of the Probate Court of Kings county, New York, has been appealed from devolutively does not present any legal reason for not recognizing presently in Louisiana the decree.

Succession of Gaines, p. 1237.

The following testamentary disposition is a valid and lawful donation *mortis causa* of the usufruct of specified property to A for her lifetime, and of the naked ownership of the property to B's children, notwithstanding the inclusion of the words "the naked ownership shall revert," which are clearly shown by the context not to have served the testator in expressing his real purpose:

"I do give and bequeath after my death to A. the usufruct or life enjoyment of all my property, real, personal or mixed, which I may die possessed of, and my will is that after the death of A the naked ownership shall revert, and I do give and bequeath unto her nephew B, for the benefit of his six children, said property."

Succession of Good, p. 1392.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